90-455

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

GENERAL WOOD PRESERVING COMPANY, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CHARLES A. EDWARDS
GRAHAM & JAMES
P.O. Box 1951
Raleigh, North Carolina 27602
(919) 821-8000

Attorney for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. Do the remedial powers of the National Labor Relations Board encompass the right to order a bona fide successor employer to bargain with a labor organization in the absence of voluntary recognition or certification of the labor organization where such an order is predicated solely upon the commission of unfair labor practices by the predecessor employer?

2. Absent evidence that a bona fide successor employer possessed notice of its predecessor's commission of serious unfair labor practices, may the duty to remedy those unfair labor practices be imposed upon the successor?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner General Wood Preserving Company, Inc.[1] respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on June 18, 1990, as corrected July 2, 1990.

OPINION BELOW

The opinion of the Court of Appeals is reported as *General Wood Preserving Co. v. NLRB*, 905 F.2d 803 (4th Cir. 1990), and appears in the Appendix hereto. Also included in the Appendix are the Orders of the National Labor Relations Board and the Recommended Decision and Order of the Board's Administrative Law Judge, all of which will be reported as 288 NLRB No. 102.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on June 18, 1990. No petition for rehearing was filed, and this petition for certiorari was filed within 90 days of the entry of judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

> Sec. 160(c). Reduction of testimony to writing; findings and orders of Board.
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> . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named

[1] General Wood Preserving Company is not publicly traded, nor is its parent, Investor's Management Corporation.

in the complaint has engaged in or is engaging in any unfair labor practice, then the Board shall state its findings of fact and shall cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of this subchapter. . . .

> Sec. 160(e). Petition to court for enforcement of order; proceedings; review of judgment.

. . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

STATEMENT OF THE CASE

On June 29, 1984, General Wood Preserving Company, Inc. (General Wood) purchased the assets of the Leland, North Carolina, wood treatment plant of Burke-Parsons-Bowlby, Inc. (Bowlby). This purchase represented the culmination of a negotiating process which began in late January, 1984 with Bowlby's offer to sell the Leland plant to Stanley Winborne Jr. A former Bowlby employee, Winborne had overseen the construction of the Leland facility in 1979 and had managed the plant for Bowlby for its initial year of operations before leaving the company in 1980.

After informally agreeing to purchase the plant in early March, 1984, Mr. Winborne entrusted all further negotiations to his son, Stanley Winborne III. There is no evidence to indicate that Stanley Winborne III ever visited the Leland facility; his participation in the purchase was confined to a review of of the financial records of the plant at Bowlby's corporate offices in West Virginia.

Immediately prior to the purchase of the Leland plant assets by General Wood, the AFL-CIO had been pursuing an organizing campaign at that facility. A representation petition was filed with the NLRB on February 13, 1984. An election was scheduled for March 16, 1984, then re-

scheduled to April 6. Prior to the rescheduled election, Bowlby brought in employees from other facilities who were argued to be eligible to vote in the election. On April 4, the International Woodworkers of America filed an unfair labor practice charge against Bowlby, thereby blocking the scheduled election.[2]

A complaint and notice of hearing issued on May 11, 1984, alleging that Bowlby supervisors and managers had interrogated and threatened employees, promised improved benefits, and engaged in "unit packing" by transferring employees to the Leland plant. The charge of "unit packing" was deleted by amendment of the complaint on June 8. There is no evidence in the record that either of the Winbornes were aware of the charge or the complaint.

On June 20, 1984, Stanley Winborne Jr. made a brief speech to Bowlby employees, informing them that General Wood had purchased the Leland plant. He announced a plant shutdown of approximately two weeks' duration and further stated that he was "not in favor of the union, but that the decision was up to them."[3] Eight days later, the Union sent a telegram, addressed to "Mr. Winburne" of "General Wood Preserves" at the closed Leland plant, claiming that it represented a majority of the bargaining unit employees and asserting that Bowlby had committed "numerous serious unfair labor practices."[4] The sale of the plant to General Wood was closed the following day.

Additional unfair labor practice charges were later filed and the complaint was amended three more times, includ-

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[2] The charge alleged, "On or about March 4, 1984, and thereafter, the Employer interfered, restrained and coerced those employees who were forming a labor organization."

[3] By this time, the election had been rescheduled for July 3.

[4] A mailgram purporting to incorporate a verbatim copy of the Winborne telegram was sent to the regional office of the NLRB at 7:30 P.M. on June 28, 1984, the eve of the date set for closing the asset purchase. A copy of this mailgram was received into evidence at the administrative hearing and constituted the only evidence of Winborne's notice of Bowlby's commission of unfair labor practices. (App. 20-21).

ing an amendment re-alleging the charge of unit packing. After a hearing before Administrative Law Judge Lawrence W. Cullen, a recommended decision issued on June 30, 1986. The ALJ's decision found that Bowlby indeed had committed a number of unfair labor practices, including the unit packing claim. The order also concluded that General Wood was a successor to Bowlby and, as such, was obligated to remedy Bowlby's unfair labor practices.

The ALJ found "that a bargaining order should issue against . . . Bowlby . . . in view of Bowlby's unlawful interrogation, threats, disciplinary warnings, and a suspension of its employees [sic][5], and most significantly in its packing of the unit . . . which dissipated the Union's majority, and also in view of the threats of plant closure, subcontracting out of work, and job loss. . . . " (App. 75). He went on to find that "The combination of these hallmark violations ['threats of plant closure, job loss, and subcontracting, as well as the unit packing'] and the impossibility of remedying these violations by Bowlby as a result of its sale of the plant clearly demonstrate that it is no longer possible to conduct a free and fair election." (App. 76).

The ALJ concluded that General Wood, as a successor employer obligated to remedy Bowlby's unfair labor practices, would also be required to abide by the bargaining order. The ALJ also found that General Wood's conduct was "a continuation of the predecessor's campaign to erode the Union's majority status." *Id.* The sole independent unfair labor practice found to have been committed by General Wood was its failure to hire seven former Bowlby employees,[6] which the ALJ deemed "clearly calculated to subvert the election process in order to assure a lack of union support." *Id.* The ALJ did not view "the passage

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[5] One Bowlby employee was suspended for three days.

[6] After the sale had taken place, the Union charged that General Wood's failures to hire were discriminatory as to thirty-five Bowlby employees. A later charge narrowed the group of alleged discriminatees to twelve.

of time and the turnover of supervisory personnel at General Wood"[7] as altering General Wood's "bargaining obligation as a successor." *Id.*

On review by the NLRB, a three-member panel adopted the recommended order with slight modifications not pertinent to this discussion. In so doing, however, the Board ascribed somewhat different reasons for imposing a bargaining order on General Wood, reasoning that General Wood's retention of the Bowlby supervisory force somehow implicated General Wood as a participant in a continuing anti-union campaign. (App. 50).

The NLRB then filed a petition for enforcement in the United States Court of Appeals for the Fourth Circuit. That Court enforced the Board's order in all respects, in a 51-page decision entered June 18, 1990. The Fourth Circuit's decision, which does not indicate that it represents the first instance of successor bargaining order liability, treats the bargaining order as a natural and foreseeable result of Bowlby's unfair labor practices. The Court of Appeals viewed General Wood's status as a successor to Bowlby, General Wood's "notice" of the commission of unfair labor practices, and the company's discriminatory hiring as creating a circumstance in which it would not be inequitable to enforce the remedial order against the successor. This ruling presents yet a third set of reasons for enforcing the bargaining order against General Wood.

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[7] By the date of the administrative hearing, most of the Bowlby supervisors initially hired by General Wood were no longer employed at the plant, while Greene had been transferred into the nonsupervisory position of Sales Manager. The two prime offenders in Bowlby's management, Richard Bowlby and Carl Williams, never became employees of General Wood. The composition of the hourly workforce was also quite different than it had been in June, 1984.

REASONS FOR GRANTING THE WRIT

I. THERE IS SUBSTANTIAL CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS RESPECTING THE APPROPRIATE ANALYSIS OF BOARD ACTION ORDERING AN EMPLOYER TO BARGAIN WITH AN UNCERTIFIED LABOR ORGANIZATION.

A. This Case Poses A Significant Unsettled Question Respecting The Circumstances Where A Bargaining Order Is The Appropriate Remedy.

The decision of the National Labor Relations Board in this case, as enforced by the Fourth Circuit, represents the outer reaches of a doctrine first recognized by this Court twenty years ago and not revisited since.

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), this Court held that if a labor union with demonstrated majority support had been subjected to an employer's pervasive unfair labor practices calculated to undermine that majority, the Board could consider issuing a "bargaining order," compelling the employer to recognize and negotiate with the union without first requiring the normal election procedures. 395 U.S. at 614. The most egregious employer misconduct, "marked by 'outrageous' and 'pervasive' unfair labor practices," might lead to a bargaining order even in the absence of demonstrated majority support for the union. 395 U.S. at 613. This characterization has come to be known as "*Gissel* Category I." In instances treating employer misconduct of a lesser degree, a bargaining order could issue only "where there is a showing that at one point the union had a majority." 395 U.S. at 614. As the opinion makes clear, the Court's holding was limited to these "*Gissel* Category II" cases. *Id.*

Notwithstanding this Court's clear caution in *Gissel* that the remedy of a bargaining order should be infrequently invoked, 395 U.S. at 615, the Board resorts to the issuance of bargaining orders with regularity. *See NLRB v. Marion Rohr Corp.*, 714 F.2d 228, 230 (2d Cir. 1983) (noting the Board's "well-established preference for issuing a bargaining order"); *NLRB v. Village IX, Inc.*, 723 F.2d 1360, 1371

(7th Cir. 1983) (commenting that the Board "overuses the bargaining order"). Rather than reserving this extraordinary remedy only for instances in which "the possibility of erasing the effects of past practices and ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight", 395 U.S. at 614, it has become routine for the Board to impose bargaining orders mechanically, with no consideration given to whether traditional remedies would suffice. *NLRB v. J. Coty Messenger Service*, 763 F.2d 92, 99-101 (2d Cir. 1985); *NLRB v. Appletree Chevrolet, Inc.*, 608 F.2d 988, 998 (4th Cir. 1979); *Red Oaks Nursing Home, Inc. v. NLRB*, 633F.2d 503, 510 (7th Cir. 1980). Indeed, many have questioned whether the standards developed by the Board and adopted by the courts of appeals have strayed from the precepts first articulated in *Gissel. John Cuneo, Inc. v. NLRB*, 459 U.S. 1178 (1983) (Rehnquist, J., joined by Powell, J., dissenting from the denial of a petition for writ of certiorari).

Complicating any reasoned review in this area is the Board's practice of abbreviated analysis, whereby the Board typically adopts without elaboration the evaluations of the Administrative Law Judge. *International Union, UAW v. NLRB*, 802 F.2d 969, 972 (7th Cir. 1986); *NLRB v. Atlas Microfilming, Inc.*, 753 F.2d 313, 320-21 (3d Cir. 1985) (Adams,J., concurring). This confusion is compounded by the Board's use of boilerplate language and its adoption of the term "hallmark violation" to designate those types of misconduct which it considers sufficiently deplorable to support the imposition of a bargaining order.[8]

As employed by the Board, *Gissel* analysis has evolved into the statement of a series of legal conclusions, unac-

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[8] The expression "hallmark violation" has its genesis in the first decision in NLRB v. Jamaica Towing, Inc., 602 F.2d 1100, 1104 (2d Cir. 1979), where the court employed the phrase to denominate highly coercive unfair labor practices. Since that decision, that court has struggled with the significance which should be attributed to the finding of a hallmark violation. *See e.g.* NLRB v. Windsor Indus., Inc., 730 F.2d 860, 866 (2d Cir. 1984) (presence of hallmark violation "does not automatically call for a bargaining order").

companied by any discussion of the dispositive factual features of the particular case. Such an *ipse dixit* approach deprives the reviewing court of the opportunity for meaningful review of the legal basis for imposition of the bargaining order. *Montgomery Ward & Co. v. NLRB*, 904 F.2d 1156, 1159 (7th Cir. 1990). A rising level of frustration with this Board practice has led some reviewing courts to decline to remand cases to the Board for further consideration of the propriety of the bargaining order remedy. *NLRB v. Pace Oldsmobile, Inc.*, 739 F.2d 108, 111-12 (2d Cir. 1984); *NLRB v. Village IX, Inc.*, 723 F.2d 1360, 1373 (7th Cir. 1983).

Generally speaking, the Courts of Appeals for the Second and Seventh Circuits subject Board petitions for enforcement of bargaining orders to the most rigorous scrutiny. *NLRB v. Pace Oldsmobile*, 739 F.2d 108, 111-12 (2d Cir. 1984); *NLRB v. Loy Food Stores*, 697 F.2d 798, 801 (7th Cir. 1983). The District of Columbia Circuit also requires the Board to state substantial reasons justifying the issuance of a bargaining order. *St. Agnes Medical Center v. NLRB*, 871 F.2d 137, 147-49 (D.C.Cir. 1989).

In contrast, the full Third Circuit has announced, in two strongly divided decisions, that it will confine its review of the Board's action to an abuse-of-discretion standard. *NLRB v. Permanent Label Corp.*, 657 F.2d 512, 521 (3rd Cir. 1981)(*en banc*), *cert. denied*, 455 U.S. 940 (1982); *NLRB v. Keystone Pretzel Bakery, Inc.*, 696 F.2d 257 (3d Cir. 1982)(*en banc*). The Sixth Circuit, while at times suggesting that its review is heightened in cases involving bargaining orders, *NLRB v. Valley Plaza Inc.*, 715 F.2d 237, 244 (6th Cir. 1983), also professes extreme deference to the Board's remedial discretion. *Indiana Cal-Pro, Inc. v. NLRB*, 863 F.2d 1292, 1302 (6th Cir. 1988). Other circuits are in apparent dissarray with respect to the review of *Gissel* orders. *See e.g. NLRB v. Horizon Air Services, Inc.*, 761 F.2d 22 (1st Cir. 1985); *NLRB v. Dadco Fashions, Inc.*, 632 F.2d 493 (5th Cir. 1980); *NLRB v. Ely's Foods, Inc.*, 656 F.2d 290 (8th Cir. 1981); *Sahara Datsun, Inc. v. NLRB*, 811 F.2d 1317 (9th Cir. 1987); *NLRB v. Wilhow Corp.*,

666 F.2d 1294 (10th Cir. 1981); *Piggly Wiggly, Tuscaloosa Div. Commodores Point Terminal Corp. v. NLRB*, 705 F.2d 1537 (11th Cir. 1983).

The Fourth Circuit, in *NLRB v. Apple Tree Chevrolet, Inc.*, 671 F.2d 838 (4th Cir. 1982), severely chastised the Board for failing to justify adequately the need for a bargaining order, stating that the reasons advanced by the Board were "only conclusory statements clothed with little more than transparent factual generalities." 671 F.2d at 841. Since the adoption of an especially deferential standard of review in the *en banc* decision in *NLRB v. Maidsville Coal Co.*, 693 F.2d 1119 (4th Cir. 1982), *enf'd on reh'g en banc* , 718 F.2d 658 (1983), *cert. denied*, 465 U.S. 1079 (1984), the court had not published another bargaining order decision prior to the one here under review.

The touchstone of *Gissel* is the recognition that certain unfair labor practices may so pervasively intimidate the workforce and so compromise the normal election procedures that traditional remedies are deemed insufficiently curative. 395 U.S. at 614. Clearly, any factual foundation for the issuance of a bargaining order must incorporate specific findings respecting the breadth and depth of the coercive sentiment felt in the workforce as well as some assessment of the futility of traditional remedies. Any remedy fashioned by the Board should, at a minimum, be shown to "be tailored to the unfair labor practice it is intended to redress." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984). Some appellate courts have attempted to address this issue squarely by describing the nature of factual findings adequate to support the issuance of a bargaining order. *Peoples Gas System, Inc. v. NLRB*, 629 F.2d 35, 46 (D.C.Cir. 1980); *NLRB v. American Spring Bed Mfg. Co.*, 670 F.2d 1236, 1247 (1st Cir. 1982); *J.J. Newberry Co. v. NLRB*, 645 F.2d 148, 153-54 (2d Cir. 1981).

The Board generally disregards these standards, displaying a "stubborn refusal . . . to make adequate findings to support the issuance of a bargaining order". *NLRB v. Village IX, Inc.*, 723 F.2d 1360, 1371 (7th Cir. 1983).

In the instant case, the findings of the ALJ respecting the propriety of a bargaining order are particularly brief:

> I find that a bargaining order should issue against Respondent Bowlby in view of Bowlby's unlawful interrogation, threats, disciplinary warnings and a suspension of its employees, and most significantly in its packing of the unit by importing employees to subvert the election process which dissipated the Union's majority, and also in view of the threats of plant closure, subcontracting out of work, and job loss engaged in by Bowlby including its threats of subcontracting and that of unspecified reprisals issued by its president. The threats of plant closure, job loss, and subcontracting, as well as the unit packing, clearly constitute hallmark violations. The combination of these hallmark violations and the impossibility of remedying these violations by Bowlby as a result of its sale of the plant clearly demonstrate that it is no longer possible to conduct a free and fair election.

(App. 75-76).

This reasoning is faulty in two critical respects: First, in focusing upon the *types* of unfair practices charged—particularly the failed attempt to pack the unit[9]—rather than their frequency or extent, the ALJ neglected to make any reference to the perceived corrupting effect of these practices or why this taint would linger and thus preclude an election. Second, the ALJ's reliance upon the sale of the company as a basis for his finding that traditional remedies would be unavailing is not only deductively untenable, it is hopelessly at odds with the finding that General Wood is obligated to remedy these same unfair practices. *Compare, Mid-South Bottling Co. v. NLRB*, 876

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[9] Unit packing, successful or not, has rarely been held to constitute so serious an unfair labor practice as to require a bargaining order, perhaps owing to the ease with which the Board's election procedures allow for the challenge of the "packed" voters. House of Cycle, Inc., 264 NLRB 1030, 1031 (1982); Trend Construction Corp., 263 NLRB 295 (1982); Yaloz Mold & Die Co., 256 NLRB 30 (1981).

F.2d 458, 463-64 (5th Cir. 1989) (directing employer to reopen plant and bargain with newly-certified union); *NLRB v. National Car Rental Systems, Inc.*, 672 F.2d 1182 (3d Cir. 1982) (reinstatement order directed to successor does not also require the successor to bargain).

The Fourth Circuit, avoiding any critical review of the Board-adopted conclusions of the ALJ, perfunctorily noted that an election "is the traditional and preferred method for determining the bargaining agent for employees," but nonetheless concluded that the imposition of a bargaining order against General Wood was an appropriate exercise of the Board's discretion. (App. 46). In doing so the court advanced a novel and entirely independent rationale for the justification of the bargaining order: that Bowlby's attempt to pack the unit as well as General Wood's discriminatory hiring practices both constituted "hallmark violations" which, when considered cumulatively, rose to a *Gissel* Category I degree of severity. (App. 43-44). Such an approach carries the *Gissel* doctrine to an unprecedented and unsupported extreme.

The opinions below characterize various flippant remarks made by Bowlby's supervisors and heard by no more than ten employees as "repeated threats of plant closure," thus falling at least within the purview of *Gissel* Category II. The disciplinary warnings given to union adherents by Bowlby were treated in a similar manner. No significance was attributed to the narrow scope of the disciplinary action—only four employees received these private written warnings—or the fact that Bowlby's personnel files were not transferred or otherwise made available to General Wood. These unfair campaign activities, touching a relatively small percentage of the proposed unit of sixty-four members, simply do not rise to the level contemplated by *Gissel*, incapable of redress by lesser remedies. The lower court clearly erred in so holding.

B. This Case Poses A Significant Unsettled Question Respecting The Effect Of Intervening Events On The Propriety Of A Bargaining Order Remedy.

This case squarely presents the issue of whether the Administrative Law Judge and the Board are required to weigh the ameliorative effects of events occurring after the commission of the charged unfair labor practices and prior to the decision-maker's consideration of the case and determination of an appropriate remedy.

Courts of appeals have often remanded cases to the Board and directed consideration of the mitigating effects of the passage of time and events transpiring since the commission of the charged unfair labor practice. *Impact Industries, Inc. v. NLRB*, 847 F.2d 379, 383 (7th Cir. 1989); *NLRB v. Knogo Corp.*, 727 F.2d 55, 60 (2d Cir. 1984). The Court of Appeals for the Second Circuit is particularly demanding on this point. *NLRB v. J. Coty Messenger Service, Inc.*, 763 F.2d 92, 101 (2d Cir. 1985).

Those courts which adhere to this perspective often point out that if it can be demonstrated that the passage of time or employee turnover has dissipated the coercive effects of the employer's unfair labor practices, the necessity for the imposition of the extraordinary remedy has been vitiated. *First Lakewood Associates, Inc. v. NLRB*, 582 F.2d 416, 424 (7th Cir. 1978). Even in the case of an employer whose "intransigent recidivism" is "patent and overt," consideration must be given to a rerun election, the preferred method for determining the wishes of the employees.

> [S]ince a Board-conducted election is the preferred mode of determining employee sentiment, the Board should approach the bargaining order with some caution. The touchstone is the protection of employee free choice. If, *at the time of the Board proceedings*, the conditions at the plant are such that a fair election is probable, the Board should not issue a bargaining order.

J.P. Stevens & Co. v. NLRB, 441 F.2d 514, 524-25 (5th Cir.) (emphasis added), *cert. denied*, 404 U.S. 830 (1971).

Several appellate courts, however, support the Board's position by rejecting any consideration of post-violation events. *Exchange Bank v. NLRB*, 732 F.2d 60, 64 (6th Cir. 1984); *NLRB v. Fort Vancouver Plywood Co.*, 604 F.2d 596 (9th Cir. 1979), *cert. denied*, 445 U.S. 915 (1980); *NLRB v. Wilhow Corp.*, 666 F.2d 1294, 1304-05 (10th Cir. 1981). The reasoning offered in most of these decisions is that consideration of subsequent events would serve to reward employer intransigence and promote administrative delay. *Hedstrom Co. v. NLRB*, 629 F.2d 305, 312 (3d Cir. 1980)(*en banc*), *cert. denied*, 450 U.S. 996 (1981); *NLRB v. L.B. Foster Co.*, 418 F.2d 1, 4 (9th Cir. 1969), *cert. denied*, 397 U.S. 990 (1970); *but compare*, *NLRB v. Buckley Broadcasting Co.*, 891 F.2d 230, 234-35 (9th Cir. 1989), *cert. denied*, 495 U.S. ___, 110 S.Ct. 2619, 110 L.Ed.2d 640 (1990), and *NLRB v. Western Temporary Services, Inc.*, 821 F.2d 1258, 1270 (7th Cir. 1987) (changed circumstances are relevant only in the absence of a recognized or certified union). Whatever the position of a particular court of appeals, the issue has been a persistent subject of debate. *NLRB v. Creative Food Design, Inc.*, 852 F.2d 1295, 1305 (D.C.Cir. 1988) (Starr,J., dissenting); *Bandag, Inc. v. NLRB*, 583 F.2d 765, 774 (5th Cir. 1978) (Clark,J., dissenting); *NLRB v. Quality Aluminum Products, Inc.*, 813 F.2d 795, 798 (6th Cir.) (Krupansky,J., dissenting), *cert. denied*, 484 U.S. 825 (1987); *Montgomery Ward & Co. v. NLRB*, 904 F.2d 1156, 1162 (7th Cir. 1990) (Easterbrook,J., concurring); *see also* Note, *"After All, Tomorrow Is Another Day": Should Subsequent Events Affect the Validity of Bargaining Orders?*, 31 Stan. L. Rev. 505 (1979); Note, *The Gissel Bargaining Order: Is Time A Cure-All?*, 26 Duquesne L. Rev. 447 (1987).

The intervening occurrences most often cited as significant to an analysis of the appropriate remedy are an unusually high degree of turnover in the workforce, *Montgomery Ward & Co. v. NLRB*, 904 F.2d 1156, 1160 (7th Cir. 1990), and the discharge of supervisors responsible

for the most opprobrious conduct. *NLRB v. Pilgrim Foods, Inc.*, 591 F.2d 110, 119 (1st Cir. 1987); *First Lakewood Associates v. NLRB*, 582 F.2d 416, 424 (7th Cir. 1978). Also, a change in ownership has been held to be a relevant factor in determining whether a recurrence of the unfair labor practices is probable, particularly in those cases where the anti-union animus emanated from uppermost management. *NLRB v. American Cable Systems, Inc.*, 427 F.2d 446, 448 (5th Cir.), *cert. denied*, 400 U.S. 957 (1970); *Impact Industries, Inc. v. NLRB*, 847 F.2d 379, 383 (7th Cir. 1988).

In one of the few cases in which the Board has sought to enforce a bargaining order against a successor employer, the court in *NLRB v. Cott Corp.*, 578 F.2d 892 (1st Cir. 1978), concluded that where "both the employer who committed the unfair practices believed to have poisoned the electoral climate and the employees who were subjected to these influences have left the scene . . . an election again becomes the best way of discovering the employees' intent." 578 F.2d at 895.

Amidst the debate, and disavowing the supervisory authority of the appellate courts[10], the Board steadfastly clings to the notion that events occurring after the commission of unfair labor practices are irrelevant to the consideration of an appropriate remedy. One recent opinion which denied the post-hearing introduction of evidence of broad employee turnover epitomizes the Board's stance regarding the significance of intervening events.

> In determining whether a bargaining order is appropriate, the Board has specifically held that 'the valid-

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[10] The Board recognizes only its own prior precedents and the rulings of the United States Supreme Court as controlling. *See* Limpert Bros., Inc., 276 NLRB 364, 380 (1985), *enf'd mem.*, 800 F.2d 1135, *reh'g denied*, 800 F.2d 333 (3d Cir. 1986), *cert. denied*, 479 U.S. 1087 (1987). With respect to post-violation events, the Board has stated that "the administration of the Act, for which we are responsible, requires that we await a final disposition by the Supreme Court of the issue in order to resolve the conflict with other circuits on this important issue." Chandler Motors, Inc, 236 NLRB 1565, 1566 n.8 (1978).

> ity of a bargaining order depends on an evaluation of the situation as of the time the unfair labor practices were committed.' *Highland Plastics*, 256 NLRB 146, 147 (1981). Thus, the evidence concerning employee turnover that the Respondent offers is an irrelevant consideration when assessing the propriety of issuing a *Gissel* bargaining order. *Salvation Army Residence*, 293 NLRB No. 118, slip op. at 4 (May 9, 1989).

Action Auto Stores, Inc., 298 NLRB No. 135, Slip op. at 3 (1990).

In this case, the ALJ based the imposition of the bargaining order exclusively upon events occurring prior to the sale of the plant, apparently disregarding evidence relating to the significant changes transpiring at the facility in the interim. For example, the opinion of the ALJ makes no reference to evidence that the two Bowlby officials who were most outspoken in espousing anti-union sentiment (owner Richard Bowlby and plant manager Carl Williams) *never* became associated with General Wood. Neither did the ALJ concede the significance of the following salient fact: of the seven Bowlby supervisory employees found to have engaged in any conduct constituting an unfair labor practice, only two were still employed at the facility at the time of the hearing. Although the issue was plainly presented on appeal, the opinion of the court of appeals makes no mention of it.

Intervening remedial events occurring at the plant were accorded no significance in the choice of an appropriate remedy in this case. Fidelity to *Gissel* mandates that the Board meaningfully evaluate the likelihood of conducting a fair rerun election. It is manifest that this evaluation be made in light of circumstances prevailing at the time the appropriate remedy is determined. The Board and the reviewing court of appeals clearly erred in their curt rejection of these relevant considerations.

C. This Case Poses A Significant Unsettled Question Respecting The Power of The Board to Issue A Bargaining Order Absent A Showing of Majority Support.

The result reached by the court of appeals in this case represents the first instance in which a bargaining order has been imposed absent a showing of majority union support in the workforce subject to the order. While Petitioner concedes, as it must, that a majority of the employees of the facility favored an election at a time when the plant was owned by Bowlby, no accepted method of appraising employee sentiment yields a like result respecting the workforce as it actually existed at General Wood. Because the ALJ treated the issue strictly as an inchoate bargaining obligation devolving upon the successor, he made *no* findings with respect to union majority status at the General Wood facility.

Of the forty-three employees in the proposed bargaining unit, eighteen had not previously worked at the Leland facility and therefore had not been present during the organization drive. Seven Bowlby employees who had not signed the representation petitions also were employed by the new company. Conversely, eighteen members of the proposed unit were former Bowlby employees who had purportedly signed petitions, although only fourteen signatures were authenticated.[11] As recognized by the Court of Appeals, "a total of 25, or a majority, of those 43 employees had not opted in favor of the Union." (App. 37).

The court then proceeded to credit the signatures of the seven alleged discriminatees and discount a corresponding

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[11] The Court of Appeals accepted as authentic all eighteen signatures, reasoning that had the General Counsel been aware of the significance of the authentication issue respecting the remaining four signatures "*in all likelihood he would have been able to have done* [*so*]." (App. 39 n.33)(emphasis supplied). The General Counsel bears the burden of proving the authenticity of each signature. J.P. Stevens & Co., 268 NLRB 63 (1983).

number of unit members who were not signatories to the petitions. This operation resulted in a finding that twenty-five of the forty-three unit members had elected union representation, the court concluding that "it can be said *with far greater likelihood than not* that a majority of the employees in General Wood's unit *would have been found* to have signed the petitions opting for union representation but for General Wood's discriminatorily having refused to hire the seven former Bowlby unit employees who had signed the petitions." (App. 39) (emphasis supplied).

The Fourth Circuit thus crafted a "constructive majority" by (a) counting four unauthenticated petition signatures; (b) including the votes of the seven alleged discriminatees; and (c) disregarding the wishes of seven individuals actually employed by General Wood. Such a conjectural method of computation contradicts the evident composition of the General Wood workforce and is contrary to prior decisions of the Board. Thus, despite attempts to portray the bargaining order imposed against General Wood as one based upon a showing of prior majority status, it is in all respects a minority bargaining order.

The Court of Appeals for the District of Columbia Circuit is the only reviewing court which has fully examined the remedial authority of the Board to issue a minority bargaining order. *Conair Corp. v. NLRB*, 721 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1241 (1984); *see also United Dairy Farmers Co-Op Association v. NLRB*, 633 F.2d 1054, 1066-69 (3d Cir. 1980) (concluding that, in theory, a minority bargaining order was within the Board's remedial authority). Scrutinizing the holding in *Gissel*, the District of Columbia Circuit Court rebuffed the Board's attempt to enforce a bargaining order in a situation where it could not be shown that a majority of the members of the proposed bargaining unit favored union representation. "Absent a union election victory or some other concrete manifestation of majority assent to union representation, it is impossible to project the employees' choice reliably; imposition of a bargaining order in these circumstances

runs a high risk of opposing the majority's will." 721 F.2d at 1383. Soon thereafter, the Board acquiesced, agreeing that it was beyond the remedial authority conferred in Section 10(c) of the Act to issue a bargaining order in a non-majority setting. *Gourmet Foods*, 270 NLRB 578 (1984).

In sum, the unprecedented and speculative method by which majority union support was found to have existed within the proposed bargaining unit was erroneous, and results in a form of redress which finds no support in the Board's own remedial analysis. Without the essential predicate of proof of majority union support, the imposition of a bargaining order against General Wood must fail.

D. This Case Poses A Significant Unsettled Question Respecting The Proper Role of the Appellate Court In the Review of An Administrative Adjudication.

In its review of this case, the court below engaged in considerable independent fact-finding, including drawing a number of significant inferences from the administrative record which were neither presented by the parties nor relied upon in any prior proceedings. In doing so, the court exceeded the proper scope of appellate review.

The scope of review for the factual findings of an administrative agency is a familiar one: The reviewing court is bound by the agency's findings of fact if they are supported by substantial evidence in the record considered as a whole. 29 U.S.C. § 160 (e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). At the same time, however, in considering the legal basis of the agency action the court may not attempt to make up for deficient agency analysis by independently supplying a basis for the action upon which the agency itself did not rely. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *Federal Power Commission v. Texaco, Inc.*, 417 U.S. 380, 397 (1974). In the context of the review of NLRB action, one court of appeals has summarized its review as follows:

> If the Board applies an erroneous legal rule in concluding that the facts establish a violation of the Act

> . . . we are not bound by the Board's conclusion that the Act has been violated. *See Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 182, 92 S.Ct. 383, 399, 30 L.Ed.2d 341 (1971) ("the legal standard to be applied is ultimately for the courts to decide and enforce"). Instead, we apply the Board's factual findings to the correct legal standard. If the Board has not made a necessary finding, we may nevertheless sustain its conclusion if the record clearly supports the omitted finding. If the record is unclear, we may remand to the agency for further proceedings. If the record clearly provides no support for the necessary finding, however, we may deny enforcement without resort to remand. *See Delco-Remy Div., Gen. Motors Corp. v. NLRB*, 596 F.2d 1295, 1309-10 (5th Cir. 1979).

Pioneer Natural Gas Co. v. NLRB, 662 F.2d 408, 411 (5th Cir. 1981). Such a standard is consistent with past decisions of this Court which state that a reviewing court should "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transportation, Inc. v. Arkansas-Best Freight Systems, Inc.*, 419 U.S. 281, 286 (1974). In its most recent term, this Court stated that "it is elementary that if an agency's decision is to be sustained in the courts on any rationale under which the agency's factual or legal determinations are entitled to deference, it must be upheld on the rationale set forth by the agency itself." *Fort Stewart Schools v. FLRA*, 495 U.S. ___, 110 S.Ct. 2043, 2049, 109 L.Ed.2d 659, 672 (1990).

By contrast, in its review of this case the Fourth Circuit devised its own justifications for the Board's conclusions, employing an independent examination of the administrative record, supplemented by inferences which the court deemed reasonable. Notable among these conclusions are the court's examination of the majority status issue, discussed in Sec. I(C), and its estimation of the intimidating effects of the attempted unit packing and discriminatory hiring, an evaluation which led the court to its erroneous

classification of this case as falling within *Gissel* Category I. (App. 43-44).

At this juncture, it is important to bear in mind that neither the ALJ nor the Board made *any* findings relating to the workforce sentiment engendered by Bowlby's attempt to pack the unit. Additionally, the only findings relating to the effects of General Wood's alleged discriminatory hiring practices are to be found in a passing observation made by the Board. (App. 50). Against this rather stark backdrop, the reviewing court presumed the following effects of the attempted unit packing:

> Rigging or attempting to rig an election in which candidates are standing for election to public office is criminal in most if not all jurisdictions of the United States. It has pervasive, enduring and adverse effects in the electoral process in that it thwarts the law and the public weal and creates doubt in the minds of some voters as to whether the casting of their votes in future elections is not an idle exercise and thus undermines the integrity of the system. Unit packing by Bowlby here, the counterpart of such rigging in a public election, almost certainly had equally pervasive, enduring and adverse effects upon the minds of Bowlby's employees in the unit.

(App. 43).

Similar treatment was accorded the effects of General Wood's alleged discriminatory hiring practices; the court opined that since, as a general proposition, the *discharge* of union activists creates a formidable intimidating effect, a similar presumption should attach to General Wood's alleged refusal to hire the seven signatories to the representation petitions. (App. 43).

However plausible, the "common sense" reaction of the Fourth Circuit cannot be considered to be a substitute for substantial evidence *in the record*. Under *Gissel*, it is the responsibility of the administrative agency to make a meaningful inquiry into the effects of unfair labor practices

with due regard to the unique circumstances of each workforce and workplace. The abstruse generalizations of the appellate court, divorced from the facts of the case before it, serve to undermine the integrity of *Gissel*. Such an approach reduces the mandated fact-intensive and interest-sensitive analysis to a mere recitation of the types of unfair labor practices found followed by hit-and-run citations to prior decisions holding like practices to constitute "hallmark" violations.

The Fourth Circuit ultimately furnished an entirely original legal basis for justifying the bargaining order against General Wood. While the Board had viewed the pivotal legal issue as one respecting the derivative liability of a successor, the court of appeals rested its decision upon the primary liability of General Wood stemming from its own alleged discriminatory hiring practices. (App. 43). In effect, therefore, the Fourth Circuit created two bargaining orders, one directed against Bowlby and another against General Wood, each resting upon distinct misconduct. The court ignored the sufficiency of the Board's traditional reinstatement and back-pay remedy for General Wood's refusal to hire. Confronted with a similarly flawed majority opinion, one judge recently observed:

> In an impressive piece of advocacy, my colleagues summon up arguments that the Board, blinded by its doctrinaire approach . . . has not made (and for aught that appears, has not even thought of). I repeat: neither the ALJ nor the Board even mentioned the Company's employee-turnover argument. The reasons the court supplies for the Board's not doing so amount to classic *ad hoc* rationalizing, which is but a different species of a no-no which should by now have been quite settled in the precincts of this courthouse. *Ad hoc* rationalizing by agencies (or by courts on their behalf) simply will not do.

NLRB v. Creative Food Design Ltd., 852 F.2d 1295, 1306-07 (D.C.Cir. 1988)(Starr, J., dissenting).

In this case, the court of appeals deviated from accepted norms of judicial review by supplying its own justification for the imposition of a bargaining order against General Wood. Acceptance of the court's reasoning reduces the interest-balancing analysis of *Gissel* to the following syllogism: "All Section 8(a)(3) infractions constitute hallmark violations falling within the ambit of *Gissel* Category I; the presence of hallmark violations will always support the issuance of a bargaining order; therefore, so long as the Board provides the factual predicate for a finding of any Section 8(a)(3) violation, the discretion of the Board in issuing a bargaining order will not be questioned by the reviewing court." Meaningful appellate review of agency determinations should not be so blithely discarded.

In conclusion, the varying analytical models adopted by the reviewing courts have produced a plethora of inconsistent decisions, rendering impossible any reasoned analysis in this area.[12] Justice Holmes contended that the legal profession exists to predict "the incidence of the public force through the instrumentality of the courts", and that reported decisions provide "the scattered prophecies of the past upon the cases in which the axe will fall." Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457 (1897). A review of the progeny of *Gissel*, however, yields more uncertainty than prophecy.

II. THIS CASE REPRESENTS THE FIRST INSTANCE IN WHICH ENFORCEMENT OF A BARGAINING ORDER IS SOUGHT AGAINST A BONA FIDE SUCCESSOR EMPLOYER.

This case also raises issues concerning the farthest extent to which liability might be imposed upon a successor employer under the doctrine first announced by this Court

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[12] One empirical study of the appellate courts' review of petitions for enforcement of bargaining orders concluded that "the most significant predictors of the probability for enforcement are whether the Second or Seventh Circuits decided the case." Bethel & Melfi, *Judicial Enforcement of NLRB Bargaining Orders: What Influences The Courts?*, 22 U. C. Davis L. Rev. 139, 173 (1988).

in *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973).[13] In *Golden State* this Court held that a successor corporation could be held liable to provide redress (in the form of back pay and job reinstatement) for its predecessor's discriminatory discharge of union adherents, relying upon *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972).

This Court clarified its holding in *Golden State* the following term. *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249 (1974), held that a successor corporation was not obligated by its predecessor's collective bargaining agreement to arbitrate employee grievances. Recapitulating the prior successorship cases, the opinion emphasizes both the fact-intensive nature of the inquiry as well as the delicate balancing of the relevant interests:

> [T]he real question in each of these "successorship" cases is, on the particular facts, what are the legal obligations of the new employer to the employees of the former owner or their representative. The answer to this inquiry requires analysis of the interests of the new employer and the employees and of the policies of the labor laws in light of the facts of each case and the particular legal obligation which is at issue, whether it be the duty to recognize and bargain with union, the duty to remedy unfair labor practices, the duty to arbitrate, etc. . . . A new employer, in other words, may be a successor for some purposes and not for others.

Howard Johnson, 417 U.S. at 262 n. 9.

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[13] There has been no suggestion that General Wood is the *alter ego* of Bowlby or that the facility was sold for the purpose of evading any bargaining obligation. Regal Knitwear Co. v. NLRB, 324 U.S. 9, 13-14 (1945). Moreover, neither the ALJ nor the Board found the sale of the plant to constitute an unfair labor practice. *Compare*, Mid-South Bottling Co. v. NLRB, 876 F.2d 458 (5th Cir. 1989) (employer required to re-open plant and bargain with union).

The notions of employer successorship first developed under the authority of *Burns* and *Golden State* have since been employed by the Board in cases seeking to hold local labor organizations liable for remedying the unfair labor practices of their predecessors. *NLRB v. Local Union No. 46, Metallic Lathers*, 727 F.2d 234, 237 (2d Cir. 1984); *Local Union No. 5741, United Mine Workers of America v. NLRB*, 865 F.2d 733, 736 (6th Cir. 1989).

The general analytical method has also been applied to successorship issues arising in the context of employment discrimination litigation. The analysis first announced in *Golden State* has been applied to similar issues arising under Title VII, *Bates v. Pacific Maritime Association*, 744 F.2d 705, 708 (9th Cir. 1984); *EEOC v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1091 (6th Cir. 1974), as well as claims founded upon 42 U.S.C. § 1981. *Musikiwamba v. ESSI, Inc.*, 760 F.2d 740, 744-47 (7th Cir. 1985).

Central to any *Golden State* successorship analysis is the element of notice. The *sine qua non* of successor liability is the perceived ability of the purchasing entity to identify (and quantify) the cost of assuming the seller's liabilities, thereby enabling the purchaser to secure indemnity from the seller[14] or negotiate adjustments in the purchase price. *Golden State*, 414 U.S. at 185. It is essential, therefore, for the Board to establish that the successor possessed knowledge of the liability sought to be imposed.[15]

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[14] Contrary to the "findings" of the court of appeals, *see* App. 25 n. 23, the asset purchase agreement entered into between Bowlby and General Wood did in fact contain a term calling for Bowlby to indemnify the purchaser for any undisclosed or unknown liabilities. However, this provision also required General Wood to seek indemnity within one year of the purchase. Since the determination of the ALJ imposing the bargaining obligation was not entered until two years after the sale, the indemnification clause of the agreement was rendered ineffectual.

[15] Although in past administrative decisions the Board has stated that notice to the successor is presumed and it is therefore incumbent upon the successor to prove lack of notice, Am-Del-Co, Inc., 234 NLRB 1040, *enf'ment denied sub nom.* Merchants Home Delivery Service, Inc. v. NLRB, 580 F.2d 966 (9th Cir. 1978), no court of appeals has yet

All of the opinions below have erroneously placed great emphasis upon the telegram allegedly sent to Winborne on the day prior to the closing of the sale of the plant assets. (App. 21, 77). The document introduced into evidence was a photocopy of a mailgram directed to the regional office of the NLRB purporting to contain the text of a telegram to Winborne. The mailgram reflects that it was transmitted at 7:30 p.m. on June 28, 1984, the eve of the closing. The mailgram also indicates that the simultaneous transmission to Winborne was addressed to him at the post office box of Bowlby's Leland plant, which had been closed for more than a week. Also significant is the absence of any reference to the deleted unit packing claim, which the ALJ, the Board and the court of appeals later considered to tip the scales in favor of a bargaining order remedy.

In addition to the effectiveness of the notice as it relates to the scope of the charged unfair labor practices, the timeliness of its transmission is disputable, at least within the context of successorship analysis. In *Musikiwamba v. ESSI, Inc.*, 760 F.2d 740, 752 (7th Cir. 1985), the court rejected as untimely the notice given to a successor consisting of a "Motion to Add Additional Defendants" in a pending discrimination action which was filed on the day scheduled for closing the sale of the defendant employer.

> The basis of the notice requirement is that the successor has some time to negotiate a change in the purchase agreement to reflect the potential liability of a lawsuit; a pleading filed at the Eleventh Hour naming the successor as defendant clearly gives a successor little if no time to reconsider a sale that for all intents and purposes has been completed. . . . [A] successor who has exercised due diligence and failed to uncover evidence of the plaintiff's lawsuit

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endorsed this approach. NLRB v. Local Union No. 46, Metallic Lathers, 727 F.2d 234 (2d Cir. 1984). Moreover, this basis for attributing notice to General Wood was not urged by the General Counsel in any of the proceedings below.

> will not be found to have notice when a pleading listing it as a defendant is filed the very day the transaction is to take place.

Clearly, the communication dated June 28, 1984, even if it had been received on that date, would not be effective to apprise General Wood of the scope or seriousness of the charged unfair labor practices in time for General Wood to extract additional concessions from Bowlby. Thus, the mere fact that this document may have been transmitted hours before the consummation of the asset purchase agreement should not be the determinative factor in affixing successor liability.

In addition to the mailgram, two separate agency theories were advanced to impute notice of Bowlby's unfair labor practices to General Wood in advance of the sale. The ALJ inferred notice from General Wood's hiring of supervisor Thomas Greene after its purchase of the Bowlby facility, theorizing that Greene's knowledge of the various unfair labor practices, acquired while a Bowlby employee, was imputed to General Wood upon commencement of his new employment. The court of appeals, perhaps recognizing the weakness of this premise, sought to establish this indispensable element by examining the actions of "Stanley Winborne" as reflected in the administrative record. From its independent examination of the record, the court of appeals concluded that inferences drawn from the circumstances surrounding the purchase of the Bowlby facility pointed (at least circumstantially) to Winborne's awareness of Bowlby's commission of unfair labor practices. Neither one of these notions of agency withstand conscientious scrutiny.

This is not a case of notice predicated upon the same person's control of both corporations, *NLRB v. Hot Bagels and Donuts, Inc.*, 622 F.2d 1113, 1116 (2d Cir. 1980), or where the principal in the predecessor corporation is employed in a similar capacity with the successor, as was the case in *Golden State*. 414 U.S. at 172-74; *see also Evans Services, Inc. v. NLRB*, 810 F.2d 1089, 1094 (11th Cir.

1987). Rather, the ALJ specifically "imputed to General Wood" notice of the unfair labor practices based upon the knowledge of Bowlby's Production Manager Thomas Greene, who was later hired by General Wood. (App. 77). This holding is contrary to both established agency law, *see* Restatement (Second) of Agency § 9(3) (1958), and appellate precedent. Confronting a like theory of imputed notice, the court in *NLRB v. Local Union No. 46, Metallic Lathers*, 727 F.2d 234 (2d Cir. 1984), stated the following:

> Before the Board could impose responsibility on Carpenters to remedy International's unfair labor practice, it had to find that Carpenters had knowledge of the charges pending against International at the time the two unions affiliated. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 185, 94 S.Ct. 414, 425, 38 L.Ed.2d 388 (1973). Carpenters denied that it had actual knowledge, and no witness testified to the contrary. Our role in determining whether the Board misapplied the common law agency principles of imputed knowledge is not limited. . . . We do not exceed our authority, therefore, in holding, as we do, that the ALJ erred in imputing the knowledge of International's President . . . "at all times material herein" to Carpenters, by whom he became employed following affiliation. This holding simply does not square with long-established common law principles of agency.

727 F.2d at 237; *see also Marlene Industries Corp. v. NLRB*, 712 F.2d 1011, 1021 (6th Cir. 1983).

Notice of the commission of the unfair labor practices cannot therefore be imputed to General Wood in the manner adopted by the ALJ.

The independent examination of the administrative record conducted by the court of appeals produced a similarly faulty result. In examining the actions of "Stanley Winborne", a review which betrays no appreciation of the participation of two "Stanley Winbornes" in the purchase of the Bowlby facility, (App. 20), the reviewing court built inference upon inference to conclude that "Winborne" had

(or should have had) the requisite knowledge of Bowlby's commission of specific unfair labor practices.

> It is clear . . . that he knew of the Union's ongoing campaign for recognition at the plant and that a new representative election was to be held on July 3. He *almost certainly must have then known* that Bowlby's unit packing had caused the April 4 election to have been rescheduled. He further *must have known* then that Bowlby had issued the warnings and suspensions to its employees that were later held by the Board to have been violations of the Act. . . .

(App. 22) (emphasis supplied).

Extrapolating further from the actions of "Winborne", the court of appeals essentially made a credibility determination respecting an individual who did not testify at the administrative hearing.

> Circumstantially, it overtaxes the most naive credulity to believe that Winbourne [*sic*], with the experience gained by him from his employment with and acting as a consultant for Bowlby, and having the business sophistication that he manifested by his successfully negotiating for General Wood to purchase the plant from Bowlby for over three million dollars and arranging for General Wood to hire almost all of Bowlby's supervisory force, and in doing so necessarily speaking at length with Bowlby's owners and its supervisors, did not learn of Bowlby's having committed the unfair labor practices it had committed during the Union's campaign at the plant, and if he did not learn of them in so doing, that being the prudent businessman that he was, he did not investigate and learn of them before causing General Wood to purchase the plant on June 29, nine days after he spoke to Bowlby's employees. It is thus understandable that Stanley Winbourne [*sic*] did not testify at the hearing held by the ALJ.

(App. 22).

Obviously, an appellate court is not the appropriate body to make credibility determinations. *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). Neither is it appropriate for a court of appeals to invoke the adverse inference rule where the trier of fact has not done so. *NLRB v. Link-Belt Co.*, 311 U.S. 584 (1941).

Moreover, Winborne's awareness of the ongoing organizing campaign does not support the sweeping inferences made by the court of appeals. Knowledge of union activity does not constitute "notice" for purposes of successorship analysis. *Compare, W & W Steel Co. v. NLRB*, 599 F.2d 934, 940 (10th Cir. 1979)(evidence that alleged successor, prior to purchase, "did 'hear' about a union being involved at the plant" was insufficient to constitute notice); *with NLRB v. Fabsteel Co. of Louisiana*, 587 F.2d 689, 691 (5th Cir. 1979) (knowledge of outstanding order against seller supported successorship finding).

Before the Fourth Circuit, General Wood presented a number of arguments against the imposition of derivative successor liability, which arguments were disregarded by the court. As the court noted in a protracted single-sentence paragraph, (App. 35-36), General Wood challenged the Board's successorship conclusions by raising several salient points: (1) "even if a majority of Bowlby's employees signed petitions . . . the Board failed specifically to identify which of Bowlby's former employees in the unit were hired by General Wood or what percentage of union support existed among the [General Wood] employees"; (2) "all reported successorship decisions rest upon either the certification of a union . . . or upon the predecessor's having voluntarily recognized the union"; and (3) there is no carryover of any presumption of majority status in the absence of certification or voluntary recognition, so that if a new employer does not hire a majority of those employees who have demonstrated a pro-union attitude, "then it violated Board policy to issue a bargaining order in the non-majority setting in the successor's newly-constituted unit." (App. 35-36).

Having thus fairly paraphrased the thrust of General Wood's objections to the Board's successorship findings, the court endeavored to salvage the ultimate result reached by the Board without reference to the numerous arguments presented. After contorting the Board's findings regarding the majority status issue, (App. 36-39), *see* Section I(C) above, the court inexplicably ignores the remaining components of General Wood's argument, turning instead to other issues. This is perhaps the most glaring evidence of the court's insistence upon treating the issues raised by the employer as an attempt to overturn an immutable fact-driven finding committed to the sole and unreviewable discretion of the Board. Such a perspective simply does not comport with established principles of administrative law. *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971).

The unsubstantiated *ex post facto* rationalizations provided by the court of appeals do not suffice to provide the essential element of notice. Absent more concrete evidence that General Wood had knowledge of the pending unfair labor practice charges, the enforcement of the bargaining order must fail.

CONCLUSION

The result reached by the lower court in this case represents an unprecedented extension of the decisions reached by this Court in both *Gissel* and *Golden State*. The need to resolve longstanding variances among the circuits respecting the review of *Gissel* bargaining orders, as well as the necessity for definition of the parameters of successor liability require the intercession of this Court. The petition for writ of certiorari should be granted.

Respectfully submitted,

CHARLES A. EDWARDS
Post Office Box 1951
Raleigh, NC 27602
Attorney for Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 88-1331

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

GENERAL WOOD PRESERVING COMPANY;
BURKE-PARSONS BOWLBY,
Respondents.

On Application for Enforcement of an Order of the National Labor Relations Board.

Argued: March 8, 1989 Decided: June 18, 1990

Before MURNAGHAN, Circuit Judge, BUTZNER, Senior Circuit Judge, and STAKER, United States District Judge for the Southern District of West Virginia, sitting by designation.

Enforcement granted by published opinion. Judge Staker wrote the opinion, in which Judge Murnaghan and Senior Judge Butzner joined.

ARGUED: Robert Francis Mace, NATIONAL LABOR RELATIONS BOARD, Washington, D.C., for Petitioner. Charles A. Edwards, GRAHAM & JAMES, Raleigh, North

Carolina, for Respondents. **ON BRIEF:** Rosemary M. Collyer, General Counsel, Robert E. Allen, Associate General Counsel, Aileen A. Armstrong, Deputy Associate General Counsel, Collis Suzanne Stocking, Supervisory Attorney, NATIONAL LABOR RELATIONS BOARD, Washington, D.C., for Petitioner.

STAKER, District Judge:

This case was instituted here pursuant to section 10(e) of the National Labor Relations Act (Act), 29 U.S.C.A. § 160(e) (West 1973),[1] by the National Labor Relations Board (Board) seeking enforcement of a *Gissel* bargaining order[2] entered by the Board against Burke-Parsons Bowlby (Bowlby) and General Wood Preservative Company (General Wood), respondents herein. Enforcement of the Board's order against each of them is granted.[3]

Hearing was held by an Administrative Law Judge (ALJ) upon unfair labor practices charges filed pursuant to the Act against Bowlby and General Wood, respectively, in consolidated cases 11-CA-11282, 11-CA-11376 and 11-CA-11487. Both Bowlby and General Wood filed answers denying the charges against them in those cases. General

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[1] Section 10(e) of the Act empowers the Board "to petition any court of appeals of the United States . . . wherein the unfair labor practice in question occurred . . . for the enforcement of" the Board's orders and provides that "[u]pon the filing of such petition, the court shall . . . have jurisdiction of the proceeding and of the question determined therein . . . ."

[2] So-called from *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969), wherein the Court approved the Board's issuance of such an order.

[3] The Board entered an order against General Wood on May 12, 1988, but failed to include Bowlby therein. On September 30, 1988, the Board entered another order against both Bowlby and General Wood which, except in particulars not material here, contained the substance of its May 12, 1988, order. Those two orders are herein referred to as the "Board's order."

Wood did, but Bowlby did not, appear at the hearing held before the ALJ therein, nor did anyone participate at that hearing on behalf of Bowlby. The ALJ rendered his decision therein on June 20, 1986, which included an order recommended by him for adoption and entry by the Board. The Board affirmed the ALJ's findings and conclusions contained in that decision and adopted the recommended order.[4]

The Board's order required Bowlby and General Wood, as Bowlby's successor at a wood-treatment plant at Leland, North Carolina (plant), which Bowlby had owned and operated for some time prior to Bowlby's sale thereof to General Wood on June 29, 1984,[5] to recognize and bargain collectively with the International Woodworkers of America, AFL-CIO (the Union), as the collective bargaining representative of a unit consisting of all production and maintenance employees at the plant, a majority of whom, the ALJ found, had signed petitions selecting the Union as such representative; to offer to hire seven employees hereinafter named who had been employed by Bowlby at the time of that sale, whom the ALJ found General Wood had refused to hire, in violation of section 8(a)(1) and (3) of the Act, because of their union activities; and to make those employees whole by paying them back pay with interest and restoring to them the seniority and other employment rights and benefits to which they would have been entitled but for General Wood's discriminatorily having refused to hire them for that reason.

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[4] In so doing, the Board effected minor modifications to that decision and recommended order, none of which are material to the issues here.

[5] The ALJ had found that General Wood had attained that successorship status at least by the end of July 1984, when General Wood had hired employees in the pre-existing classifications and had employed a complement of 44 employees in the unit that had been established at Bowlby prior to General Wood's purchase of the plant.

The ALJ's findings and conclusions, as affirmed by the Board, are respectively sometimes herein said to be those of the ALJ and at others those of the Board.

I

Proceedings in This Court

On September 7, 1988, the Board filed its initial application here seeking enforcement of its order against respondent General Wood only, and on October 7, 1989, filed an amendment to that application wherein both Bowlby and General Wood were joined as respondents and enforcement of the Board's order was sought against both of them. General Wood timely responded thereto.

Through oversight the Clerk of this Court did not serve upon Bowlby notice of the filing of the amended application nor disclose to the Court that it had been filed.

In the mistaken belief that General Wood was the only party respondent herein, following the hearing of arguments in March 1989 the Court prepared its decision, dated February 16, 1990, enforcing the Board's order as to General Wood only, whereupon the Board informed the Court that Bowlby had also been joined as a respondent and moved that the decision be corrected such that the Board's order also be enforced against Bowlby. General Wood did not object to that motion.

Bowlby then appeared generally herein by filing its motion for permission to plead or to answer the Board's motion, in substance asserting as ground therefor that Bowlby and its counsel, Mr. Holroyd, assumed that Bowlby's interests in this action were being protected by Mr. Edwards, General Wood's counsel, for which reason Bowlby did not theretofore appear herein. In response to Bowlby's motion, General Wood asserted that Bowlby incorrectly so assumed, and attached to that response was a copy of a letter from Mr. Holroyd to Mr. Edwards, dated

October 12, 1988, stating "You [Mr. Edwards] are correct in your assumption that . . . [Bowlby] does not want to participate any further in this case."

On March 20, 1990, this Court entered an order directing the clerk thereof to serve upon Bowlby the amended application filed against Bowlby herein by the Board and granted Bowlby leave within thirty days to file an answer to that amended application and to file an answer to the Board's motion to correct this Court's February 16, 1990, decision. Bowlby did not file an answer to either that amended application or to the Board's motion to correct that decision.

On April 12, 1990, this Court entered an order staying the Court's mandate then in effect herein until further order of the Court.

By letter from the clerk of this Court to Mr. Holroyd, Bowlby's counsel, dated March 29, 1990, Bowlby was requested to file a brief herein, in response to which Mr. Holroyd informed the clerk by letter of April 5, 1990, that "[U]pon review of the record in this matter and consultation with . . . [Bowlby] we do not desire to file a brief as provide [sic] in your March 29, 1990 letter."

Bowlby having declined to file herein an answer, or a brief as required by Rule 15.1, Federal Rules of Appellate Procedure, or otherwise to respond to either the Board's amended application or its motion to correct the February 16, 1990, decision, an order was entered by the Court on April 30, 1990, enforcing the Board's order against Bowlby as well as General Wood.

Thus, it is only the contentions of the Board and General Wood, respectively, which are dealt with in Part III hereof, that raise the issues to be decided by the Court.

II

Bowlby's Role

Since the bargaining order sought to be enforced by the Board against General Wood is based upon the ALJ's conclusion that General Wood was Bowlby's successor, before addressing the issues between the Board and General Wood it is necessary to discuss the conclusions reached by the ALJ as to Bowlby in order fully to understand and evaluate some of the evidence upon which the ALJ based his findings and conclusions as to General Wood.

Except as indicated to the contrary, those reached as to Bowlby were based upon undisputed fact and evidence and documentary evidence, and in substance are as follows.

Majority Selection of the Union

On February 12, 1984, Bowlby employed sixty-four production and maintenance workers at the plant.[6] Early in February 1984 some of them engaged in a walkout and communicated with the Industrial Union Department (IUD) of the AFL-CIO concerning union representation of them at the plant.

Michael Black of the IUD met with some of them and informed them that he would need to determine which affiliate union he would recommend most appropriately to represent them. At that meeting 26, and thereafter others,

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[6] The ALJ calculated that when the 21 employees who were not production and maintenance workers at the plant were deducted from the total of all of Bowlby's employees there, numbering 86, there remained 64, and not 65, production and maintenance employees in the unit. The total number of such unit employees was more likely 62, since 50 of them purportedly signed the petitions opting for Union representation and 12 of them did not. Whether the unit numbered 62, 64, or 65 is not critical to the majority issue, because the signatures of at least 41 of them on the petitions were authenticated, a clear majority.

of the unit employees at Bowlby signed single-purpose petitions authorizing the AFL-CIO or its appropriate affiliate to represent them in collective bargaining with Bowlby. At a second meeting with Black, the employees in attendance thereat by voice vote selected the Union as the AFL-CIO affiliate to do so. The ALJ found 42 of the signatures on those petitions to be authentic, that those 42 signatures constituted those of a majority of the 64 production and maintenance employees comprising the appropriate unit at the plant in February, and that the lack of designation on those petitions, at the time they were signed, of the Union as the appropriate AFL-CIO affiliate to represent them was not a legal impediment to the attainment of that majority status.[7]

Bowlby's Unfair Labor Practices

On February 9, the Union formally notified Bowlby by mailgram that the Union represented a majority of Bowlby's production and maintenance employees at the plant and requested that Bowlby recognize the Union as their collective bargaining representative. Bowlby refused to do so, the Union petitioned the Board for a representative election at which those employees could vote as to whether the Union would do so, and in mid-March, the Board scheduled an election to be had on April 6 pursuant to a stipulation of election executed by Bowlby and the Union. That stipulation defined the appropriate unit to consist of the production and maintenance employees at Bowlby, excluding employees performing all other work at the plant.

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[7] Such was not an impediment in the absence of a showing that the employees who signed the petitions did not intend to authorize the Union, as an AFL-CIO affiliate, to represent them. *See NLRB v. Cam Industries, Inc.*, 666 F.2d 411 (9th Cir. 1982). Here there was no showing that any of the signers of the petitions did not intend to authorize the Union so to act. As the ALJ pointed out, there was no evidence that any of the signers of those petitions ever attempted to revoke their signatures on any of them.

The ALJ found and concluded that during February, March, and April, through its supervisors, production manager, and president, Bowlby committed the following acts, each of which constituted a violation of section 8(a)(1) of the Act:[8] Supervisor Gary Wood stated to employee Larry Brown that, if the employees selected the Union, they would lose their paid holidays and would have to start from scratch (an unlawful threat of loss of benefits); Plant Manager Carl Williams stated to employees Larry Brown, Michael Robinson and others that in that event they and he might as well look for another job (a threat of the plant's closure and the loss of their jobs); Supervisor Jimmie Smith stated to employees Warren Bryant and Alexander Hall that in that event everyone should plant a garden because they were going to be on the soup line and the plant would be closed (unlawful threats of plant closure and the loss of their jobs); Supervisor Smith stated to employee Warren Bryant that in that event they would lose benefits including "boot money" (an unlawful threat of loss of benefits); Supervisor Smith stated to employee Oliver Munn that in that event the employees were going to wind up in the soup line (an unlawful threat of the loss of their jobs); Supervisor Percy Burns stated to employee John Ganey that if the employees kept going the way they were with the Union, the plant would shut down (an unlawful threat of plant closure); Supervisor Bill Caldwell stated to employee Greg Burton that when you sit down to bargain, you lose all benefits (an unlawful threat of loss of benefits if the employees selected the Union); Bowlby's president, Richard Bowlby, stated at a meeting attended

[8] Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." 29 U.S.C.A. § 158(a)(1) (West 1973). Section 157 provides in part that "employees shall have the right to self-organization, to form, join or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C.A. § 157 (West 1973).

by Bowlby's Plant Manager Carl Williams and employees Michael Robinson and Paul Bowens that if the Union came in, he would ship poles out and get them peeled cheaper (an unlawful threat of subcontracting work); and Supervisor Smith interrogated employee George Jenkins concerning what he thought of the Union in an environment that was not free of unfair labor practices and hence was a part of an overall campaign of unlawful interrogation and coercion.

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On March 30, Bowlby's president, Richard Bowlby, wrote a letter to the employees in which he stated:

> There are no problems that exist in this plant that we cannot work out among ourselves without the high risk the union brings. This much I promise you—we will work out our problems—we will do this with or without the union. We can do it easier and better without the union. . . . [T]hink carefully about this union and what it can cost you. You know what you now have. Don't vote yourself into a sea of trouble.

The ALJ concluded that the promise in that letter to "work out our problems" was an unlawful promise of benefits to induce the employees to reject union representation and a violation of section 8(a)(1) of the Act, and that the reference therein to the "high risk" the union would bring and the statement therein that the employees should not "vote themselves into a sea of trouble" were unlawful, unspecified threats of reprisal if the employees chose union representation and constituted a violation of section 8(a)(1) of the Act.

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Prior to the representation election scheduled on April 6, Bowlby brought to the plant 25 of its employees from other states, placed their names on its list of employees

to vote in that April 6 election, kept them segregated from other employees there, housed them in a motel at Bowlby's expense, fed them from specially catered trucks, and did not require them to wear shirts or hard hats as was required of other Bowlby employees. Some of them told employees Alexander Hall and Greg Burton that they were brought in for the express purpose of voting in the election and would leave the day after it was to be held. As a result of charges filed by the Union, the April 6 election was blocked and all but four of those 25 out-of-state employees left on April 7, and Bowlby's records thereafter ceased to show them as having worked any hours.

The ALJ found and concluded that in so doing Bowlby engaged in "unit packing" in an attempt to capture the election and thereby violated section 8(a)(1) of the Act.

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The ALJ found and concluded that, from late February into late June, Bowlby unlawfully, and in violation of the Act as stated below, issued warnings and suspension against the following employees, respectively, all of whom had actively supported the Union.[9]

Warren Bryant

Bryant engaged in the walkout, signed a union petition, wore a "Vote Yes" pin for a time and urged his fellow employees to support the Union.

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[9] The ALJ's conclusions pertaining to these warnings and the suspension were based upon a preponderance of the evidence, which was unrebutted except for that of Bowlby's Production Manager, Thomas Greene, who testified that he came to the employ of Bowlby in that capacity in December 1983 and in January 1984 commenced to issue disciplinary warnings to employees. The ALJ found that it was only after the advent of the Union campaign, beginning in early February, that Bowlby commenced to issue such warnings and that its doing so manifested a marked interest in then enforcing rules that had not theretofore been enforced.

He was absent from work on May 21 because of car trouble and telephoned his foreman, Jimmie Smith, to inform him of that fact. Smith told him to hurry to work. He was unable to fix his car that day and reported to work on the following day, when Production Manager Greene called him to his office and issued him a written warning for not reporting to work the day before.

The ALJ found that warnings had theretofore been issued to employees for failing to report to work only when they had failed to "call in," and that Bowlby had violated section 8(a)(1) and (3)[10] of the Act by the issuance of that warning to Bryant.

Warren Jacobs

Jacobs engaged in the walkout, attended union meetings, signed a union petition, passed out union leaflets at the gate and obtained the signature of other employees on petitions. His supervisor was aware of his union support.

On May 21, he received a written warning from Production Manager Greene for being late for work notwithstanding his presentation of a doctor's excuse in explanation of his tardiness. Jacobs was aware of no instance theretofore in which a warning had been issued to a tardy employee who had presented a doctor's excuse.

The ALJ concluded that Bowlby had violated section 8(a)(1) and (3) of the Act by issuing the warning to Jacobs.

George Jenkins

Jenkins attended a Union meeting, signed a petition, discussed his support of the Union with other employees

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[10] Section 8(a)(3) of the Act provides it to be an unfair labor practice for an employer "to encourage or discourage membership in any labor organization" by "discrimination in regard to hire or tenure of employment or any term or condition of employment ...." 29 U.S.C. § 158(a)(3) (West 1973).

and told his supervisor that he hoped the employees got the Union in so that it would help them to receive better benefits.

On February 27, he stopped operating a pole machine because of heavy rain and gave that as his reason for having done so to his supervisor, Kenny Smith, who told him he could wait a few minutes until the rain slackened and then restart the machine. The next day Production Manager Greene issued to him a written warning for being "unwilling to work due to weather conditions."[11]

The ALJ concluded that Bowlby had violated section 8(a)(1) of the Act by issuing a warning to Jenkins.[12]

Greg Burton

From the outset, Burton had been a leader in the move to unionize the plant's production and maintenance employees, actively participated as their designated spokesman for a time, engaged in the walkout, contacted the AFL-CIO's IUD on their behalf, met with IUD coordinator Black, signed a union petition, wore T-shirts reading "100 percent Union," spoke at meetings held by Production Manager Greene and Plant Manager Carl Williams and met with Bowlby's president concerning employees' complaints.

On June 13, Greene gave Burton a written warning that had been dated June 12, which noted thereon days on which he had been late for, or absent from, work, including an instance on June 11 when Burton had left early. Im-

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[11] Greene testified that other employees had not ceased work because of the rain, but later testified that he was not certain as to what happened because he was not personally present at the time.

[12] The ALJ concluded that Bowlby had thereby also violated section 8(a)(3) of the Act; however, the Board's order struck that conclusion from the decision, because a violation of section 8(a)(3) as to Jenkins in respect to this warning has not been alleged.

mediately after giving him that warning on June 13, Greene issued to him a three-day suspension from work because of his failure to report for work on June 12 and because of the written warning given him on June 13.[13]

The ALJ concluded that after the advent of the Union's campaign, Bowlby suddenly commenced to enforce rules concerning tardiness, absenteeism and work performance that had not theretofore been enforced, that Bowlby was discriminatorily motivated to do so as its response to the Union's campaign and that Bowlby thereby violated section 8(a)(1) and (3) of the Act.

III

General Wood's Role

The Board contends that the findings and conclusions reached by the ALJ in his decision, as affirmed by the Board, were supported by substantial evidence on the record as a whole and that the Board acted properly within its broad remedial discretion in issuing its bargaining order against General Wood.

In substance, General Wood contends that there was not substantial evidence on the record to support, and that the ALJ erred in finding: (a) that the signatures affixed to petitions selecting the Union to be the collective bargaining representative of the employees in the unit at Bowlby were the authentic signatures of a majority of those employees;[14] (b) that General Wood had notice of

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[13] Burton testified that his supervisor, Tom Sweeney, as well as Greene, granted him permission to leave work early on June 11. Greene testified that he did not remember discussing with Burton his leaving early on June 7 and 11, and that Burton had telephoned on one occasion when he was late for work.

[14] General Wood asserts that some of those signatures were not authenticated by the ALJ by competent evidence; otherwise, General Wood does not question any of the findings and conclusions reached by the ALJ as to Bowlby.

unfair labor practices committed by Bowlby prior to General Wood's purchase of the plant; (c) that General Wood's refusal to hire the seven former employees of Bowlby was in any way related to those employees' union activities; (d) that General Wood is Bowlby's successor; and (e) that the end of July 1984 was the appropriate "substantial and representative complement" date in respect to General Wood's work force in the unit at the plant. And General Wood asserts that even if substantial evidence on the record does support the issuance of a bargaining order against Bowlby, the evidence does not support the issuance of the bargaining order against General Wood, hence the one against General Wood was improperly issued.

Section 10(e) of the Act provides in part that "[t]he findings of the Board with respect to questions of fact if supported by substantial evidence on the record as a whole shall be conclusive." Accordingly, if the ALJ's findings of fact, as affirmed by the Board, with which General Wood takes issue, "have substantial support in the record as a whole, our inquiry ends . . . even though we might have reached a different result had we heard the evidence in the first instance." *NLRB v. Daniel Constr. Co.*, 731 F.2d 191, 193 (4th Cir. 1984), *citing Universal Camera Corp. v. NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951). Substantial evidence has been held to mean "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *NLRB v. Aquabrom, Div. of Great Lakes Chemical*, 855 F.2d 1174, 1178 (6th Cir. 1988).

The Majority (Authentication) Issue

General Wood's claim that there is not substantial competent evidence on the record to support the Board's finding that the signatures of a majority of the employees in the unit, subscribed to the petitions by which those employees selected the Union to be their bargaining representative, were the authentic signatures of those employees is demonstrably without merit.

Seven separate, single-page petitions upon which appear 50 signatures[15] purporting to be those of employees in the unit were admitted into evidence. The only evidence bearing upon their authenticity was presented by General Counsel, none of which was rebutted. The ALJ held 42 of them to be authentic.

The evidence establishes that 17 of those 50 signatures were authenticated by the testimony of the 17 employees who identified them to be their own and that 6 others of them were authenticated by witnesses who testified that they observed 6 named employees affix them thereto as their own. The authenticity of still 5 others of them is established by comparing them with what the undisputed evidence established to be the authentic specimens, on other documents of evidence, of the signatures of those 5 employees, from which it is clear that their signatures on the petitions are in fact their authentic signatures. Thus, there is substantial and competent evidence in the record to establish the authenticity of 28 of those 42 signatures the ALJ held to be authentic.

Section 10(b) of the Act provides that proceedings conducted by the Board or its agent "shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States . . . ." Rule 101, Fed. R. Evid., provides "[t]hese rules govern proceedings in the courts of the United States . . . ." Hence, proceedings conducted by the Board or its agent, such as those that were conducted by the ALJ, are to be conducted in accordance with the Federal Rules of Evidence. Rule 901(a) and (b)(1) and (3), Fed. R. Evid., permits signatures to be authenticated by the methods by which the 28 signatures were demonstrated to have been

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[15] Despite literary rules dictating the contrary, in the interest of readability numbers of employees and signatures are expressed in figures herein.

authenticated.[16] *See Colson Corp. v. NLRB*, 347 F.2d 128, 134 (8th Cir. 1965), *cert. denied*, 382 U.S. 904, 86 S.Ct. 240, 15 L.Ed.2d 157 (1965) (a signature may be authenticated by the testimony of a witness to the execution thereof by its subscriber as well as by a comparison of the signature with a known specimen of the handwriting of the person claimed to have subscribed it).

Two of the seven petitions contained a total of 26 signatures. Of those 26 signatures, 11 are included among the 17 signatures on all seven of the petitions that were authenticated by the testimony of the employees who affixed them thereto, as set forth above, which leaves the remaining 15 of them to depend for their authentication solely upon the testimony of IUD coordinator Michael Black.

Black testified that he met in a union hall on February 7, 1984, with 26 of Bowlby's employees; that he sat at a head table there with those employees facing him; that he first passed among them an attendance sheet; that he then displayed to them a blank form of the petitions and read

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[16] Rule 901(a) and (b)(1) and (3), Fed. R. Evid., provides:

> (a) The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
>
> (b) By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
>
> (1) Testimony that a matter is what it is claimed to be.
>
> • • •
>
> (3) Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

to them the matter appearing at the top thereof[17] and explained to them that a majority of the employees would be required to sign such a petition authorizing the union to represent them at Bowlby before the Union could do so; and that if he could recall correctly, most if not all of those 26 employees signed those two petitions at the table at which he sat, but that there may have been one or two of them who signed their names thereto away from that table,[18] and that after the petitions were signed, they were handed back to him and retained in his custody.

General Wood asserts, in substance,[19] that the Board has the burden of establishing the authenticity of the sig-

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[17] That matter at the top of the petitions reads:

> THIS WILL AUTHORIZE THE AFL-CIO AND/OR ITS APPROPRIATE AFFILIATE TO REPRESENT ME IN COLLECTIVE BARGAINING WITH MY EMPLOYER.
>
> This will also authorize said union to use my name for the purpose of organizing *Burke-Parsons-Bowlby in Wilmington, N.C.*
>
> This may include sending my name to the company with a copy of (sic) the National Labor Relations Board as well as in the signing of union leaflets.

Appearing on the petitions immediately below the above-quoted matter are five columns respectively headed "Name," "Address," "Date," "Tel No.," and "Job."

[18] Devant Graham's signature appears on the attendance sheet but not on either of the two petitions. Stanford Graham's signature appears on one of the two petitions but not on the attendance sheet. Otherwise, all 26 signatures appearing on each of the attendance sheets and on the two petitions correspond.

[19] The court gathers such to be the substance of General Wood's assertion in respect to the authentication issue from a footnote in its brief. There it asserts "[t]he ALJ's decision states that 42 of the 48 (sic) signatures on GC 101-107 (those being the exhibit numbers of the seven petitions) were authenticated at the hearing. This is not true. Some, but far from all, of the signatures on the original petitions [App. 229-235] (the original petitions being the two) were authenticated; there

natures of a majority of the employees in the unit on the petitions, with which the Court agrees, and further asserts that Black's testimony is not competent evidence to establish the authenticity of any of the 15 signatures which depend for their authenticity solely upon his testimony, wherefore the Union did not in fact attain majority status and the ALJ and the Board erred in holding that it had done so, *citing Maximum Precision Products, Inc.*, 236 N.L.R.B. 1417, 1424 (1978), and *Stop N'Go, Inc.*, 279 N.L.R.B. No. 52 (1986).

The facts here are distinguishable in critical particulars from those in *Maximum* and *Stop N'Go*. In each of them the employees signed the cards out of the presence of the witnesses by whose testimony the employee's signatures were sought to be authenticated and then delivered those cards to other persons who delivered them to those witnesses at a later time, and those witnesses did not observe the signers of the cards affix their signatures thereto nor did those signers themselves deliver those cards to those witnesses with their signatures affixed thereto. Here all 26 employees whose signatures appear on the two petitions subscribed their names thereto in Black's presence, except that one or two of them may have done so away from the table at which he sat and at a point elsewhere in the same room.[20] Black's testimony thus established that he personally observed at least 24 of those 26 employees affix their signatures to those two petitions. Such being true—and there was no evidence to the contrary—Black personally observed 13 of those 15 employees affix their signa-

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is no explanation of the failure to authenticate the remainder." General Wood's brief at 16, n.12 (parenthetical matter interpolated).

[20] Significantly, of the 26 signatures on those two petitions, 25 of them have the date "2-7-84" entered under the "Date" column on the same lines on which those 25 signatures appear. No date is entered in relation to one of those 26 signatures. The entry of that same date in relation to those 25 signatures is a circumstance that tends to corroborate Black's testimony.

tures to the two petitions. *See NLRB v. Howell Chevrolet Co.*, 204 F.2d 79, 85-86, *enforcing* 95 N.L.R.B. 410, *aff'd on other grounds*, 346 U.S. 482, 74 S.Ct. 214, 98 L.Ed. 215 (1953) (assertion of lack of authenticity of Malstom's signature on card held to be without basis for, no matter who wrote his name thereon, evidence showed he clearly adopted the signature as his own by accepting the card from, and agreeing to return it to, Leonard and thereafter returning it to Leonard with the signature appearing thereon); *Amalgamated Clothing Workers of America v. NLRB*, 419 F.2d 1207, 1209 (D.C. Cir. 1969), *cert. denied sub nom. McEwen Mfg. Co. v. NLRB*, 397 U.S. 988, 90 S.Ct. 1120, 25 L.Ed.2d 396 (1970) ("[t]he other three cards were properly authenticated by testimony that the signer had returned the card to the union agent, thus adopting as his own the signature thereon."). Indeed, it is convincingly arguable that Black's testimony was competent to authenticate all 26 of the signatures on the two petitions, since each of the 26 employees whose name appears thereon accepted one of the two petitions and then in the same room himself handed or caused it to be handed back to Black with a signature thereon.

At the very least, those 13 of the total of the 15 signatures in issue were properly held to have been authenticated by the ALJ and the Board pursuant to the provisions of Rule 901(b)(1), Fed. R. Evid.

Thus, there was substantial evidence on the record to support, and the ALJ and the Board committed no error by finding and holding, that at least 41 of the signatures on the seven petitions were the authentic ones of employees in the unit, that those 41 authenticated signatures constituted a majority of the signatures of the 64 or 65 employees in the unit and that the Union had thereby attained majority status.[21]

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[21] Although General Wood has not, either before the ALJ, the Board,

Issue of General Wood's Knowledge of Bowlby's Unfair Labor Practices

General Wood's denial that it had adequate notice, prior to its purchase of the plant from Bowlby, of the unfair labor practices that Bowlby had committed and its assertion that there is not substantial evidence on the record to support the Board's finding and holding that it did have such notice prior to that purchase, are both without merit.

The evidence in the record bearing upon this issue is undisputed.

When General Wood was incorporated by Stanley Winbourne to act as the entity that purchased the plant from Bowlby, Winbourne became General Wood's president.

As an official of Bowlby, Winbourne had overseen the construction of the plant for Bowlby in 1973, and thereafter remained in Bowlby's employ until about 1979, following which he performed services for Bowlby in the capacity of a consultant.

Prior to General Wood's purchase of the plant on June 29, 1984, Winbourne was the only person through whom General Wood acted, except that Steve Hutchinson inventoried Bowlby's assets at the plant on behalf of General Wood.

Winbourne did not testify at the hearing held by the ALJ. The only direct evidence bearing upon the issue of

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or this Court, claimed that the Union had never "timely" procured the authentic signatures on the petitions of a majority of the employees in the unit, the Court would nevertheless point out that substantial evidence on the record clearly establishes that, as of February 9, 1984, when the Union formally requested Bowlby to recognize it as the bargaining representative of the employees in the unit, the Union held petitions which bore 37 of the at least 41 signatures of the employees in the unit whose signatures were hereinabove held to be authentic, and those 37 employees then constituted a majority of the 64 or 65 employees in the unit.

whether General Wood had notice of Bowlby's unfair labor practices is the Union's mailgram to Winbourne and Steve Hutchinson's denial of his knowledge thereof, all as discussed below. However, quite apart from that mailgram, the evidence includes statements made by Winbourne and other circumstantial evidence to support the Board's finding that General Wood had such notice before its purchase of the plant on June 29, 1984.

From early March 1984 through June 29, Winbourne carried out extensive negotiations for General Wood's purchase of the plant from Bowlby.

Steve Hutchinson, who did testify, first worked for Bowlby in 1973, together with Winbourne during the construction of the plant, and thereafter worked for Bowlby off and on until the late spring or early summer of 1983, when he left Bowlby's employ to become employed by Carolina Creosote.

At least a month before the plant's purchase, Winbourne approached Steve Hutchinson and Thomas Greene, who was then Bowlby's production manager at the plant, concerning their accepting employment by General Wood there if Winbourne was successful in causing General Wood to purchase it, and he also approached many of Bowlby's supervisory staff about their doing so. After General Wood's purchase of the plant, Hutchinson became its operations manager and Greene its production manager, and James Walker, Kenny Smith, Gary Wood, Jerry Brown, Jimmie Smith, Bill Caldwell, Ted Sweeney and Percy Burns, all Bowlby supervisors, became its supervisors. Greene and some of those supervisors had been personally involved in Bowlby's unfair labor practices.

On June 20, 1984, Winbourne addressed Bowlby's employees at the plant and told them that General Wood had purchased the plant; that it would cease operations for about two weeks and would reopen in early July, when they would be hired by General Wood; and that in early

July they should file applications for employment with General Wood. He also told them then that he was not in favor of the Union, but that the decision was up to them, and that they would start their employment with General wood with "clean slates" and their benefits would not be reduced.

It is clear from those remarks of Winbourne's that he knew of the Union's ongoing campaign for recognition at the plant and that a new representative election was to be held on July 3. He almost certainly must then have known that Bowlby's unit packing had caused the April 4 election to have been rescheduled. He further must have known then that Bowlby had issued the warnings and suspensions to its employees that were later held by the Board to have been violations of the Act, else his statement as to the employees' starting with General Wood with "clean slates" was meaningless and superfluous.

Circumstantially, it overtaxes the most naive credulity to believe that Winbourne, with the experience gained by him from his employment with and acting as a consultant for Bowlby, and having the business sophistication that he manifested by his successfully negotiating for General Wood to purchase the plant from Bowlby for over three million dollars and arranging for General Wood to hire almost all of Bowlby's supervisory force, and in so doing necessarily speaking at length with Bowlby's owners and its supervisors, did not learn of Bowlby's having committed the unfair labor practices it had committed during the Union's campaign at the plant, and if he did not learn of them in so doing, that being the prudent businessman that he was, he did not investigate and learn of them before causing General Wood to purchase the plant on June 29, nine days after he spoke to Bowlby's employees. It is thus understandable that Stanley Winbourne did not testify at the hearing held by the ALJ.

Moreover, on June 28, the eve of General Wood's purchase of the plant on June 29, the Union sent to Winbourne a Western Union mailgram stating in part:

> [T]he . . . [Union] continues to represent a majority of the bargaining unit employees at your newly-acquired company or at your company which you will acquire. . . . [Y]ou are officially on notice that the company you have acquired or will acquire has committed numerous and serious unfair labor practices such a (sic) plant closure, interrogation, threats of loss of jobs or benefits, sale of plant, subcontracting work, and promising that any problems existing at the plant would be worked out easier and better without the union and numerous other unfair labor practices. We are quite aware of what you have personally told the employees. The . . . [Union] demand[s] that your company recognize the Union as the collective bargaining representative and immediately begin obeying the law and bargain with the Union and remedy all unfair labor practices committed by Burke, Parsons Bowlby and already committed by you.

In a letter dated July 6, from General Wood's attorney to the Union, General Wood acknowledged the receipt of that "telegram" and stated that General Wood declined to recognize the Union and did not accept the representations and allegations therein, and in not responding thereto did not adopt them as correct. The mailgram and letter are both in evidence.

General Wood argues that the ALJ erroneously imputed to General Wood notice, prior to its purchase of the plant, of the unfair labor practices theretofore committed by Bowlby, when at the time of that purchase General Wood only knew at most that there had been only one unfair labor charge filed against Bowlby, which was that "[o]n

or about March 4, 1984, and thereafter, . . . [Bowlby] interfered, restrained and coerced these employees who were forming a labor union,"[22] that there was no reason at the time of that purchase for General Wood to believe that Bowlby had committed any serious unfair labor practices, especially any violation of the Act sufficient to warrant seeking a bargaining order, particularly when "Bowlby had made express representations to the contrary"; that none of the arguably "hallmark" violations—unit packing, a promising and threatening letter to all employees, and warnings and suspensions directed at three Union activist employees—which Bowlby was found to have committed, had been charged against Bowlby when General Wood purchased the plant; and that the prophylactic measures mentioned in *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 185, 94 S.Ct. 414, 38 L.Ed.2d 388 (1973), as the *quid pro quo* for the liability-after-notice rule—the purchaser's ability to secure either a reduction in the price or indemnity for assuming the predecessor's liability—cannot be undertaken as to unfair labor practices of which the purchaser had no notice, wherefore General Wood, which had no notice of any "hallmark" violations by Bowlby prior to its purchase of the plant, was unable to protect itself against a bargaining order in the documents by which it purchased the plant.[23]

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[22] This charge was filed by the Union on April 4, 1984, and on that date a copy thereof was mailed to Bowlby and received by it on April 6. A complaint and notice of hearing on that charge was mailed to Bowlby on May 11 and received on May 14.

[23] The Court gathers that General Wood contends May 15, 1984, the date of the contract between Bowlby and General Wood for the sale of the plant, rather than June 29, 1984, the date that sale was consummated, to be the critical date by which General Wood must have had notice of the serious unfair labor practices committed by Bowlby if General Wood is to be held accountable here under the successorship doctrine.

That May 15, 1984, contract, which is really an option agreement,

General Wood further argues, or at least strongly implies, that a successor employer may not be charged with notice of its predecessor's unfair labor practices unless those unfair labor practices have been alleged in a formal charge or complaint filed against the predecessor of which the successor has notice.

That same argument was made, and rejected by the court, in the recent case of *NLRB v. St. Mary's Foundry Co.*, 860 F.2d 679 (6th Cir. 1988), wherein the court reasoned and held:

> When a successor employer knows that his predecessor is alleged to have engaged in unfair labor practices, he undertakes the business with notice of the risk that those allegations may ripen into findings of unfair labor practices which will

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appears in the evidence as "GC [General Counsel's Exhibit] 48." In its brief, General Wood points out that Bowlby represented to General Wood therein that Bowlby had committed no unfair labor practices that would render General Wood liable if it purchased the plant.

Bowlby did represent to General Wood in that contract that there were no civil, administrative or other proceedings or investigations pending or threatened against Bowlby, which if adversely determined would result in any liability to General Wood if it purchased the plant. (Record, GC 48, sec. 4.7). However, that contract further provided that General Wood's obligation to consummate the purchase of the plant was "at its option," subject to the fulfillment of the condition that all representations made therein by Bowlby shall be true on the closing date. (*Id.*, Art. VII and sec. 7.1).

The Union's mailgram notifying General Wood of Bowlby's serious unfair labor practices was dated June 28. Even if that was the first notice thereof to General Wood, when it consummated the purchase of the plant the next day, it had the option, pursuant to the terms of the contract, to refuse to purchase the plant unless Bowlby, by indemnity or otherwise, protected it from any consequences of any unfair labor practices Bowlby had committed, which Bowlby had, in effect, therein misrepresented itself not to have committed, notwithstanding which General Wood then opted to, and did, consummate the purchase of the plant without procuring such protection from Bowlby.

> have to be remedied, and that he may be held liable for the remedy, just as surely as if he purchased with knowledge that formal charges had been filed. In either situation, a prudent buyer would provide for the risk in the course of his negotiations with the seller. It is no more certain that the filing of formal charges of unfair labor practices will ripen into a finding of a violation of the Act, and an imposed remedy, than that the conduct complained of will lead to the filing of charges culminating in the same result. The predecessor's conduct is the same in either situation; notice of the facts and appreciation of the significance of the predecessor's conduct are the determining factors.
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> Of course, in this context, knowledge of the allegations or conduct contemplates an appreciation by the successor that the conduct could amount to an unfair labor practice in violation of the Act, just as knowledge of a filed charge provides knowledge of such a risk. To adopt a bright-line test by holding that a successor employer is liable only in the event charges have been filed, would not serve the remedial purposes of the Act. If pre-charge notice provides the same quality of information, there is no reason not to bind the successor.

Id. at 682. We likewise so hold. *See also NLRB v. South Harlan Coal, Inc.*, 844 F.2d 380 (6th Cir. 1988).

Prior to and at the time of its purchase of the plant on June 29, 1984, General Wood had knowledge of the acts and conduct of Bowlby that the Board later held constituted unfair labor practices and then fully appreciated that those acts and conduct could amount to unfair labor practices in violation of the Act on Bowlby's part and that General Wood, as Bowlby's successor, stood an

excellent chance of being held liable for remedying them and could have protected itself therefrom.

There was substantial evidence on the record to support the Board's finding and holding that prior to the purchase of the plant, General Wood had notice of Bowlby's having committed the unfair labor practices the Board held Bowlby to have committed, and the Board did not err in holding that General Wood then had such notice thereof.

General Wood's Refusal to Hire Bowlby's Seven Employees

The evidence is in dispute pertaining to this issue of whether General Wood refused to hire the seven former Bowlby employees because of their pro-union activities and sentiments in violation of the Act, on the one hand, or refused to do so for other, legitimate reasons, on the other.

It is not disputed that, after General Wood purchased the plant, Steve Hutchinson was hired as its operations manager, with supervision over the plant and all of its employees, and Thomas Greene, formerly Bowlby's production manager there, was hired as General Wood's production manager there.

Hutchinson testified that on July 2, General Wood commenced taking applications for employment from applicants desiring jobs as production and maintenance employees (applications); that at that time he had no knowledge of any union activities in which any of Bowlby's former employees had engaged, except that he knew from watching television that there had been a "walkout" at the plant in February 1984; and that he never discussed the union activity of any former Bowlby employee with Greene or any other of Bowlby's supervisors and was totally unaware of any union activity of any of Bowlby's former employees when the decision was made as to whether any of them would, or would not, be hired by General Wood. He further testified that he was responsible

for hiring everyone below him who worked at General Wood and that while he made the final hiring decisions, he did not review every appliation because the applications "were screened through Tom Greene."

Thomas Greene testified that he recommended who would be hired by General Wood. On cross-examination he testified that he did not recommend everyone who was hired and that he interviewed none of the seven former Bowlby employees that General Wood did not hire. He further testified that he recommended that Hutchinson not hire Charles Brown and George Jenkins, two of those seven employees, but made no recommendation as to the hiring of Oliver Munn, Warren Bryant, Fred (Freddie Levi) Brown, John Ganey and Greg Burton, the other five of the seven of them.

Fred (Freddie Levi) Brown testified that Hutchinson told him, and Greg Burton testified that Winbourne told him, that Greene was doing General Wood's hiring.

By their undisputed testimony, all of those seven former Bowlby employees filed applications for employment with General Wood during the period July 2 through July 6; all of them were experienced workers at the plant, five of them having commenced work there in 1979, one in 1982, and one in 1983; all of them had signed one of the petitions for union representation during February 1984, while employed by Bowlby; all had attended union meetings; all except George Jenkins had engaged in the February 1984 "walkout" at Bowlby; and all of them had otherwise openly and actively supported the Union. Warren Bryant openly wore a "Vote Yes" button; George Jenkins told Supervisor Kenny Smith and fellow workers he favored the Union; Charles Brown told Supervisors Bill Caldwell and James Walker that the employees needed the Union; Oliver Munn passed out Union leaflets and talked favorably for the Union to fellow employees and remarked in Supervisor Smith's presence that it was "Union time";

Fred (Freddie Levi) Brown passed out Union leaflets until Supervisor Burns instructed him to cease doing so; John Ganey passed out Union leaflets and talked favorably for the Union to fellow employees until Supervisor Green instructed him to cease doing so; and Greg Burton contacted the Union's IUD and requested that its representative talk with Bowlby's employees, was the spokesman for those employees, solicited their signatures on the petitions, and openly wore a T-shirt reading "100 percent Union."

Hutchinson testified that several employees were hired by General Wood who had no past experience in wood-treating work; that well before the plant's purchase he knew he was to be its operations manager and would superintend its entire operations; and that in late June he inventoried for General Wood all of Bowlby's assets at the plant. It is incredible that, having that knowledge and his prior training and experience in the industry,[24] Hutchinson was so imprudent that he did not learn, and as ignorant as he testified himself to be, after July 2, of the circumstances that attended the Union's campaign at the plant and Bowlby's reactions to its employees and the Union in respect thereto and also the identity of those of Bowlby's employees who were and were not active supporters of the Union.

Moreover, the reasons given by Hutchinson and Greene for refusing to hire the seven employees were vague and conclusory and more than strongly smacked of pretext: Greene was "not satisfied" with the results of Charles Brown's work at Bowlby; Hutchinson refused to hire Munn because the 910 Caterpillar lift was in two pieces when he had not enquired as to which other employees had

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[24] Hutchinson testified that he had a Bachelor of Science degree in Forest Management from West Virginia University, had worked for Bowlby on and off from 1973 to 1983, and had been employed by four other companies in the wood industry.

contemporaneously operated it with Munn and their records and performance in doing so; Greene recommended against hiring Jenkins because of his stopping the machine during a downpour and Greene's issuing him the warning therefor (after the Union's campaign was well underway); Hutchinson refused to hire Bryant because he had seen him operate the "125 lift," which was demolished when General Wood bought the plant, and on cross-examination testified that he had never observed Bryant operating it; Hutchinson did not hire Fred (Freddie Levi) Brown because he was "not impressed" with the way he operated a fork lift truck; Hutchinson did not hire Ganey because he deemed him not to be a "suitable employee for what I was getting ready to embark on"; and Hutchinson did not hire Burton because General Wood did not intend to do any post pointing, when Burton had operated the post pointing machine for Bowlby for only about the last two months preceding the plant's sale and had wider experience performing other jobs at Bowlby.[25]

It was thus not without good reason that the ALJ and the Board credited the testimony of the seven employees whom General Wood refused to hire and did not credit that of Hutchinson and Greene.[26]

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to encourage or discourage member-

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[25] Neither Greene nor Hutchinson assigned Burton's alleged tardiness and absenteeism while he worked at Bowlby, in respect to which Greene had issued to him the warning and the three-day suspension, as reason for General Wood's refusal to hire him.

[26] In *NLRB v. Nueva Engineering, Inc.*, 761 F.2d 961, 965 (4th Cir. 1985), this Court referred to the rule enunciated in *Universal Camera, supra*, that "[i]f the findings of the Board have substantial support in the record as a whole, our inquiry ends . . . even though we might have reached a different result had we heard the evidence in the first instance," and pointed out that such was "particularly true where . . . the record is fraught with conflicting testimony and essential credibility determinations have been made." (Citations omitted.)

ship in a labor organization by "discrimination in regard to hire." Hence, a successor employer is free either to hire or to refuse to hire a former employee of its predecessor, except that if the successor refuses to hire such an employee because of his pro-union activities or sentiments, and is thus motivated in refusing to do so by anti-union animus, then the successor has "discriminated in regard to hire" in respect to that employee and has thereby committed an unfair labor practice in violation of section 8(a)(3) of the Act. *See NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 280 n.5, 92 S.Ct. 1571, 32 L.Ed.2d 61 (1972); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 40, 107 S.Ct. 2225, 96 L.Ed.2d 22 (1987).

In *NLRB v. Nueva Engineering, Inc.*, 761 F.2d 961, 967 (4th Cir. 1985), this court explained:

> Section 8 (a)(3) of the Act, 29 U.S.C. § 158(a)(3), makes it unlawful to discharge a worker because of union activity. The Supreme Court has affirmed, as a uniform standard, that where an employer's opposition to protected activity is shown to be a substantial or a motivating factor in the decision to take adverse action against an employee, the employer will be found to have violated the Act unless the employer is able to demonstrate that the adverse action would have occurred in the absence of the employee's protected conduct. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 103 S.Ct. 2469, 2474-2475, 76 L.Ed.2d 667 (1983); *see NLRB v. Daniel Constr. Co.*, 731 F.2d 191, 197 (4th Cir. 1984). In determining whether a section 8(a)(3) violation occurred in this case, there are two crucial inquiries. Was Nueva's decision to terminate employee Leach motivated by anti-union considerations? If so, has Nueva met its burden to show

that the termination would have occurred regardless of the forbidden motivations?

Turning first to the question of motive, we note that since motive is a question of fact, the Board may infer discriminatory motivation from either direct or circumstantial evidence. *American Thread Co. v. NLRB*, 631 F.2d 316, 321 (4th Cir. 1980); *Neptune Water Meter Co. v. NLRB*, 551 F.2d 568, 569 (4th Cir. 1977).

The discharge of an employee in violation of section 8(a)(3) of the Act was involved in *Nueva Engineering, supra*. Involved here is discrimination in regard to hire in violation thereof. The above-quoted language equally applies here.

The Board found and held that a preponderance of the evidence established that General Wood violated section 8(a)(1) and (3) of the Act by its refusal to hire the above seven employees and that General Wood was motivated to do so by their having engaged in concerted activities in support of the Union. General Wood asserts that, in so doing, the Board improperly imputed to General Wood Green's knowledge gained at Bowlby that they had done so. The evidence clearly supported that imputation. Unquestionably, Greene knew who the Union activists in Bowlby's unit were. He understandably never testified to the contrary. Having formerly been Bowlby's production manager, he came to General Wood in the same capacity, was second in command there under Hutchinson and actively participated in General Wood's hiring procedures by screening the applicants, interviewing many of the applicants and recommending to Hutchinson which of most, if not all, of them should or should not be hired. As such, his knowledge was that of General Wood.[27]

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[27] The evidence leaves no question but that Greene acted as General Wood's agent commencing no later than July 2. *See American Press, Inc. v. NLRB*, 833 F.2d 621, 625 (6th Cir. 1987).

There is substantial evidence on the record to support the Board's finding and holding that General Wood violated section 8(a)(1) and (3) of the Act by its refusal to hire the seven Bowlby employees and that General Wood was motivated to do so by its anti-union animus manifested against them because of their having engaged in concerted activities in support of the Union, and the Board committed no error by so finding and holding.

The Successorship Issue

General Wood contends that there is not substantial evidence on the record to support the Board's finding and holding that General Wood's status as Bowlby's "successor" was such as to warrant, as a matter of law and fact, the Board's entry of its bargaining order against General Wood and that the Board erred in so doing.

In *Howard Johnson Co. v. Detroit Local Joint Executive Bd.*, 417 U.S. 249, 262 n.9, 94 S.Ct. 2236, 41 L.Ed.2d 46 (1974), the Court remarked:

> [T]he real question in each of these "successorship" cases is, on the particular facts, what are the legal obligations of the new employer to the employees of the former owner or their representative. The answer to this inquiry requires analysis of the new employer and of the policies of the labor laws in light of the facts of each case and the particular legal obligation which is at issue, whether it be the duty to recognize and bargain with the union, the duty to remedy unfair labor practices, the duty to arbitrate, etc. There is, and can be, no single definition of "successor" which is applicable in every context.

In *Fall River Dyeing, supra*, the Court summarized some of its pronouncements dealing with the factors which the courts must consider in making that enquiry and analysis as follows:

In *Burns* we approved the approach taken by the Board and accepted by courts with respect to determining whether a new company was indeed the successor to the old. 406 U.S., at 280-81, and n.4. This approach, which is primarily factual in nature and is based upon the totality of the circumstances of a given situation, requires that the Board focus on whether the new company has "acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations." *Golden State Bottling Co. v. NLRB*, 414 U.S., at 184. Hence, the focus is on whether there is "substantial continuity" between the enterprises. Under this approach, the Board examines a number of factors: whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers. See *Burns*, 406 U.S., at 280, n.4; *Aircraft Magnesium, a Division of Grico Corp.*, 265 N.L.R.B. 1344, 1345 (1982), *enf'd*, 730 F.2d 767 (CA9 1984); *Premium Foods, Inc.*, 260 N.L.R.B. 708, 714 (1982) *enf'd*, 709 F.2d 623 (CA9 1983).

In conducting the analysis, the Board keeps in mind the question whether "those employees who have been retained will understandably view their job situations as essentially unaltered." See *Golden State Bottling Co.*, 414 U.S., at 184; *NLRB v. Jeffries Lithograph Co.*, 752 F.2d 459, 464 (CA9 1985). This emphasis on the employees' perspective furthers the Act's policy of industrial peace. If the employees find themselves in essentially

> the same jobs after the employer transition and if their legitimate expectations in continued representation by their union are thwarted, their dissatisfaction may lead to labor unrest. See *Golden State Bottling Co.*, 414 U.S., at 184.

Id., 482 U.S. at 43-44.

Substantial record evidence unquestionably supports the Board's finding, with which General Wood takes no issue, that on June 29, 1984, General Wood purchased from Bowlby the physical plant and facility, including its production equipment, vehicles and inventory, hired almost all of Bowlby's supervisory staff, and on July 9 commenced to engage in the same business in which Bowlby formerly engaged, that of treating wood, including telephone poles, fence posts, pilings and other items, in the same manner in which Bowlby had treated them, and selling those items to substantially the same customers to whom Bowlby had sold them when Bowlby had owned and operated the plant.

General Wood rather raises other points of argument in support of its contention that it was not Bowlby's successor, arguing that even if a majority of Bowlby's employees signed petitions selecting the union as their bargaining representative at the plant, the Board failed specifically to identify which of Bowlby's former employees in the unit were hired by General Wood or what percentage of Union support existed among the employees in the newly-constituted unit at General Wood; that all reported successorship court decisions rest upon either the certification of a union as the representative of the unit in the predecessor's work force or upon the predecessor's having voluntarily recognized the union as such, in each of which circumstances the employees in the predecessor's unit are all presumptively represented by the union; and that if a majority of the employees in the predecessor's unit is hired into the successor's unit, that presumption survives, but that if a majority of them is not hired therein,

then it violated Board policy to issue a bargaining order in the non-majority setting in the successor's newly-constituted unit.

It is true that the Board did not specifically identify which of Bowlby's former employees in the unit were hired by General Wood or the precise percentage of Union support that existed in the newly-constituted unit at General Wood, but the Board was not required specifically, nor was it remiss in failing, to do so.

What the ALJ did find in this regard was the following:

> [B]y the end of July [General Wood] had hired employees in virtually all pre-existing production and maintenance classifications of its predecessor, Bowlby. Over 60 percent of General Wood's employees had been employed by Bowlby, and the supervisory force remained virtually unchanged from that of Bowlby. . . . I thus find that General Wood is a successor of Bowlby.

The record evidence includes two documents respectively listing the employees on Bowlby's payroll ending February 12 and those of General Wood on its payroll ending July 22.[25] Thomas Greene's testimony identified the employees on Bowlby's payroll who were in its unit and those on General Wood's payroll who properly fell within its corresponding unit, and in so doing testified that three of General Wood's employees on its payroll were temporary ones and were later hired permanently.

An analysis of the employees in each of Bowlby's and General Wood's units on those respective dates and the signatures of the employees in Bowlby's unit appearing on the seven petitions reveals the following facts to have been established by a preponderance of the evidence.

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[25] Bowlby's February 12 payroll is exhibit GC 38; General Wood's July 22 payroll is exhibit GC 44.

Twelve of the employees in Bowlby's unit did not sign any of the seven petitions.[29] As stated above, 50 of the employees in Bowlby's unit purportedly signed the seven petitions. The evidence indicates that 45 of those 50 did so by February 9, when the Union formally demanded recognition by Bowlby and that the remaining five of the 50 respectively did so on February 16 and 29, March 17 and 21, and April 3.

On July 12, General Wood's unit included approximately 43 employees, excluding the three then temporary ones but including Kenneth A. Smith, a former Bowlby supervisor who did not sign a petition but was hired into General Wood's unit as a pole machine operator.

Eighteen of those 43 employees in General Wood's unit, including Kenneth A. Smith, were employees who had not been in Bowlby's unit and had never had an opportunity to sign any petition opting for Union representation. An additional 7 of those 43 had been in Bowlby's unit and had had that opportunity but had declined so to opt. Thus, a total of 25, or a majority, of those 43 employees had not opted in favor of the Union.

General Wood hired only 4 of the 26 Bowlby unit employees who had signed the two petitions at the February 7 meeting attended by IUD coordinator Black. Those 26 were the most fervent Union adherents in Bowlby's unit.[30] A preponderance of the evidence established that the signatures of all 4 of them on the petitions were authentic

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[29] The ALJ stated that 10 of those 12 Bowlby unit employees who did not sign the petitions were hired by General Wood. As this Court analyzes the evidence, only 7 of those 12 were hired by General Wood. This and other minor disparities between the ALJ's and the Court's analyses of the figures dealt with in the evidence are not critical to the decision here.

[30] An employer's proof that it did not weed out all union adherents does not disprove a discriminatory motive otherwise established. *NLRB v. Instrument Corp. of America*, 714 F.2d 324, 325 (4th Cir. 1983).

notwithstanding that their 4 signatures were among the 15 of the 26 signatures thereon that depended solely upon Black's testimony for their authentication.[31]

Eighteen of the 43 employees in General Wood's unit were former Bowlby unit employees who purportedly signed one of the seven petitions. The signatures of 14 of those 18 were authenticated by a preponderance of the evidence; those of the remaining four of the 18 were not authenticated by any evidence.

If those 14 employees were added to the seven former employees who signed the petitions and would have been hired by General Wood but for its discriminatorily refusing to hire them instead of seven other employees it did hire,[32] then there would have been 21 of Bowlby's unit employees who had signed the petitions opting for the Union in General Wood's unit, and those 21 employees would have been only one or two employees short of a majority of the approximately 43 employees in General Wood's unit.

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[31] Such is statistically true notwithstanding the stochastic factor. Since Black's testimony authenticated 13 of the 15 signatures thereon that were not authenticated by other evidence, then certainly his testimony authenticated the signatures of at least 2 of those 4 employees. Moreover, since each of the signatures of the 4 of them is far more likely than not to be, and thus by a preponderance of the evidence is, among the remaining 13 of the 15 signatures thereon that his testimony did authenticate than to be any of the other 2 of the 15 signatures that his testimony did not authenticate, then the signatures of all 4 of those 4 employees were authenticated by Black's testimony. This reasoning is not inconsistent with that hereinabove by which the court pointed out that 13 of the 15 of the 26 signatures on the two petitions were authenticated by Black's testimony, since the figures analyzed there and those analyzed here differ. General Wood states that "[f]our [of Bowlby's employees] who signed the initial petitions were hired." Brief of Respondent at 15-16.

[32] "An employer may not defeat a finding of successorship through its own discrimination." *American Press, Inc. v. NLRB*, 833 F.2d 621, 625 (6th Cir. 1987).

If all 18 of those Bowlby unit employees who purportedly signed the seven petitions were added to the 7 former Bowlby employees whom General Wood had discriminatorily refused to hire, then there would have been 25 of Bowlby's unit employees who had signed the petitions in General Wood's unit, and those 25 would have clearly constituted a majority of the approximately 43 employees in General Wood's unit.

Thus, it can be said with far greater likelihood than not that a majority of the employees in General Wood's unit would have been found to have signed the petitions opting for union representation but for General Wood's discriminatorily having refused to hire the seven former Bowlby unit employees who had signed the petitions.[33]

General Wood further argues that the unfair labor practices committed by Bowlby were not "hallmark" violations and thus were not sufficiently serious to warrant the Board's issuance of a bargaining order against Bowlby, wherefore the Board's issuance of the one against General Wood was improper.

In this connection, the ALJ found as to Bowlby and General Wood respectively, that:

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[33] This is a reasonable conclusion, because evidence to authenticate the signatures of Bowlby's unit employees on the petitions was offered chiefly to establish the Union's majority status in Bowlby's, and not General Wood's, unit. Had Counsel for the General Counsel introduced evidence to authenticate the signatures on the petitions of the 4 employees in General Wood's unit that the evidence did not authenticate, which it was not necessary for him to have done to establish that the Union had achieved majority status in Bowlby's unit, but which in all likelihood he would have been able to have done, since there was no evidence that any signer of any of the petitions had ever attempted to revoke his signature thereon, then all of those 18 employees, when added to the 7 former Bowlby employees whom General Wood had discriminatorily refused to hire, would total 25 employees in General Wood's unit who had signed the petitions, a clear majority of the approximately 43 employees in General Wood's unit.

> [A] bargaining order should issue against . . . Bowlby in view of Bowlby's unlawful interrogation, threats, disciplinary warnings and suspension of its employees, and most significantly in its packing of the unit by importing employees to subvert the election process which dissipated the Union's majority, and also in view of the threats of plant closure, subcontracting out of work, and job loss engaged in by . . . Bowlby including its threat of subcontracting and that of unspecified reprisals issued by its president. The threats of plant closure, job loss and subcontracting, as well as the unit packing, clearly constitute hallmark violations. The combination of these hallmark violations and the impossibility of remedying these violations by Bowlby as a result of its sale of the plant clearly demonstrate[s] that it is no longer possible to conduct a free and fair election.
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> [T]he acts of General Wood by unlawfully refusing to hire known union adherents as found herein were clearly calculated to subvert the election process in order to assure a lack of union support. The passage of time and the turnover of supervisory personnel at General Wood do not serve to obliterate its bargaining obligation as a successor. *Keystone Pretzel Bakery*, 256 NLRB 334, 335 (981) (sic), enf'd. 696 F.2d 257 (2nd Cir. 1983).

We find no published opinion of this Court wherein it dealt with or mentioned "hallmark" violations. In *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 212-13 (2d Cir. 1980), the court pointed out that so-called "hallmark" violations had been held to include plant closure, a threat of plant closure or loss of employment, a grant of benefits to employees or the reassignment, demotion or discharge

of union adherents in violation of section 8(a)(3) of the Act; that such violations will support the issuance of a bargaining order absent "significant mitigating circumstances"; that such conduct "justifies a finding without extensive explication that it is likely to have a lasting inhibitive effect on a substantial percentage of the work force"; and that "an array of less serious violations which must either be numerous or be coupled with some other factor intensifying their effect . . . fall within *Gissel*'s second category and support an order to bargain," thus categorizing "hallmark" violations as those falling within *Gissel*'s first category.

In *NLRB v. Maidsville Coal Co.*, 718 F.2d 658 660 (4th Cir. 1983) (en banc), *cert. denied*, 465 U.S. 1079, 104 S.Ct. 1441, 79 L.Ed.2d 761 (1984), this Court pointed out that:

> The Supreme Court in *Gissel* discussed varying factual circumstances with which the Board might be faced when deciding to issue a bargaining order *vel non* without requiring an election. The first set of circumstances consists of "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices of "such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had." *Gissel Packing Co.*, 395 U.S. at 613-14, 89 S.Ct. at 1940. In this category of cases, a bargaining order may issue even though the Union may not be able to prove that it ever had a majority status among employees. A second set of circumstances consists of "less extraordinary cases marked by less pervasive practices." *Id.* at 614, 89 S.Ct. at 1940. In this category of cases, if the Union at one point during the campaign held a card majority, a bargaining order should issue when:

> [T]he Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order. . . .
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> *Id.* at 614-15, 89 S.Ct. at 1940; *see also id.* at 612 n.32. A third category of cases identified by the Court consist[s] of "minor or less extensive unfair labor practices, which, because of their minimal impact in the election machinery, will not sustain a bargaining order." *Id.* at 615, 89 S.Ct. at 1940.

In *Standard-Coosa-Thatcher Carpet Yarn v. NLRB*, 691 F.2d 1133, 1144 (4th Cir. 1982), where the union had established a card majority, petitioned for an election which it lost and the employer had committed numerous violations of section 8(a)(1) of the Act and some violations of section 8(a)(3) thereof during the union's campaign, in enforcing the bargaining order issued by the Board, the Court stated:

> The Company [employer] responded to the Union's most recent campaign with threats of plant closure, threats of retaliation against Union activists, and discriminatory discipline aimed at thwarting unionization [enforcement of a plant rule in a manner calculated to discourage Union activities among employees]. As is widely recognized, such conduct tends "to have a lasting inhibitive effect" on employees' formulation and expression of free choice regarding unionization. *N.L.R.B. v. Jamaica Towing, Inc.*, 632 F.2d at 213. It therefore justifies a *Gissel* order unless a very strong showing negates the inference of

> lasting effects. Because the record in this case reasonably supports such inferences, we cannot substitute our judgment for that of the Board.

When this Court's language quoted from *Standard-Coosa-Thatcher* next above is read in relation to that quoted from *Jamaica Towing* above, it is clear that, without referring to the employer's violations of section 8(a)(3) in *Standard-Coosa-Thatcher* as "hallmark" violations, this Court held those violations to constitute conduct that the court in *Jamaica Towing* held to be "hallmark" violations falling within the first category of unfair labor practices described in *Gissel*. It is further clear that since in *Jamaica Towing* the court designated an unlawful discharge of an employee in violation of section 8(a)(3) of the Act to be a "hallmark" violation, then General Wood's refusal to hire the seven former Bowlby employees in violation thereof would likewise constitute such a violation.

Rigging or attempting to rig an election in which candidates are standing for election to public office is criminal in most if not all jurisdictions of the United States. It has pervasive, enduring and adverse effects on the electoral process in that it thwarts the law and the public weal and creates doubt in the minds of some voters as to whether the casting of their votes in future elections is not an idle exercise and thus undermines the integrity of the system. Unit packing by Bowlby here, the counterpart of such rigging in a public election, almost certainly had equally pervasive, enduring and adverse effects upon the minds of Bowlby's employees in the unit. That Bowlby was thwarted in accomplishing its aim of unit packing to swing the election in its favor by the Board's blocking and rescheduling the election does not remove those effects of its conduct in so doing. We deem its unit packing to constitute a hallmark violation.

Bowlby thus committed violations of the Act, including repeated threats of plant closure and loss of employment

and sudden enforcement of plant rules in a manner calculated to discourage Union activities among its unit, to say nothing of its unit packing—all of which violations fell within the first category of unfair labor practices mentioned in *Gissel*—and also committed numerous unfair labor practices that fell within the second category mentioned therein. General Wood, as Bowlby's successor, thereafter refused to hire the seven former Bowlby employees and thereby committed additional violations of section 8(a)(3) of the Act, conduct that fell within that first category, and thereby added its own conduct that tended to have a lasting inhibitive effect on the employees' formulation and expression of free choice regarding unionization.

There was substantial evidence on the record to support the Board's finding and holding that General Wood was Bowlby's successor, and the Board's issuance of the bargaining order against General Wood, and the Board committed no error in so doing.

The "Substantial and Representative Complement" Issue

General Wood's claim that there was not substantial evidence on the record to support the Board's finding and holding that the end of July 1984, instead of a September 1984 date, was the appropriate "substantial and representative complement" date in respect to General Wood's work force, and that the Board erred in so holding, is without merit.

In *Fall River Dyeing, supra*, the Court said:

> In deciding when a "substantial and representative complement" exists in a particular employer transition the Board examines a number of factors. It studies "whether the job classifications designated for the operation were filled or substantially filled and whether the operation was in normal or substantially normal production." See *Premium Foods, Inc. v. NLRB*, 709 F.2d 623,

> 628 (CA9 1983). In addition, it takes into consideration "the size of the complement on that date and the time expected to elapse before a substantially larger complement would be at work . . . as well as the relative certainty of the employer's expected expansion." *Ibid.*

Id., 482 U.S. at 48-49.

Hutchinson testified that when General Wood purchased the plant, it intended to operate two shifts, and that between September 1 and 15, 1984, two shifts commenced operating there. He also testified that in July 1984, when General Wood was preparing to commence operations, he instructed Greene that he did not want two shifts but rather wanted one shift that could manufacture a saleable product.

Greene testified that it was "really sketchy" when General Wood first commenced to operate the plant as to whether a second shift would be put on; that it was hard to answer whether as of the end of July General Wood's employee complement was complete, because as of July 27 he was still interviewing for four positions on the pole machine crew; that at that time the whole plant was fully operating with one shift but was not operating to full capacity, because the pole machine department was really required to work two shifts to give the framing department enough poles to keep dry kilns and the cylinders closed.

As to this issue, the ALJ found that:

> General Wood obtained successorship status at least by the end of July when it hired employees in the pre-existing classifications and employed a complement of 44 unit employees. I reject . . . General Wood's contention that the relevant date for examining the employee complement should be 18 September when it expanded the number

> of its shifts as this expansion was highly uncertain in July according to the testimony of Greene.

Considering the factors that must be considered in deciding when a "substantial and representative complement" exists as set forth in the above quoted language from *Fall River Dyeing*, there was substantial evidence on the record to support the ALJ's finding that the end of July was the appropriate "substantial and representative complement" date as to General Wood. The evidence shows that then its job classifications designated for operation of the plant were filled or substantially filled, that the plant was in normal or substantially normal production, that the size of General Wood's complement then was not appreciably smaller than it was in September,[34] and that it was questionable at the end of July as to when if ever General Wood's complement would be expanded beyond that then existing.

As stated earlier herein, if the ALJ's findings of fact have substantial support in the record as a whole then our inquiry ends, and such is particularly true where the testimony is conflicting, as it was between that of Hutchinson and that of Greene here, and essential credibility determinations have been made by the ALJ.

We are not unmindful that an election, and not a bargaining order, is the traditional and preferred method for determining the bargaining agent for employees. *NLRB v. Apple Tree Chevrolet, Inc.*, 671 F.2d 838 (4th Cir. 1982). However where, as here,

> the possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is

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[34] General Wood's payroll ending July 22 showed a total of 74 employees, including all employees on its payroll then. Its payroll ending September 16 showed a total of 90 employees, which included all of its employees then on its payroll.

> slight and . . . employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such order should issue.

Gissel, 395 U.S. at 614-15.

For the above reasons, the Board's motion to correct the Court's February 16, 1990, decision is sustained; that decision is vacated and is replaced by the within decision;[35] and pursuant to this Court's order entered herein on April 30, 1990, the Board's petition for enforcement of its order against both Bowlby and General Wood is granted.

PETITION GRANTED

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[35] Shortly after the filing of the Board's motion to correct the Court's February 16, 1990, decision, that decision was withdrawn from publication.

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases 11–CA–11282
11–CA–11376
11–CA–11487

BURKE-PARSONS BOWLBY AND ITS SUCCESSOR, GENERAL WOOD PRESERVATIVE COMPANY

and

INTERNATIONAL WOODWORKERS OF AMERICA, AFL–CIO

DECISION AND ORDER

On June 30, 1986, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent, General Wood Preservative Company, filed exceptions and a supporting brief, and the General Counsel filed an answering brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to

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[1] In her answering brief, the General Counsel moved to strike the following statement contained in the Respondent's brief in support of its exceptions: "The unit packing by a former employer certainly is viewed as a joke by General Wood employees . . . ." The General Counsel's motion is denied because we neither accept the Respondent's claim nor rely on it.

affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

In agreeing that a bargaining order is appropriate in this case, we rely on the evidence that Respondent General

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[2] The judge found that the February 27, and March 2, 1984 warnings issued to employee George Jenkins violated Sec. 8(a)(3) and (1) of the Act. The General Counsel's answering brief notes that the issuing of these warnings is alleged to violate only Sec. 8(a)(1) of the Act, as the dates of the warnings are not within the 10(b) period of the 8(a)(3) charge in Case 11–CA–11487 filed on October 29, 1984. Accordingly, we find that the warnings issued to Jenkins violated only Sec. 8(a)(1) of the Act.

In agreeing with the finding of an 8(a)(1) threat in the March 30 letter sent by Richard Bowlby to the employees—and in particular the letter's warnings about the "cost" of a union and the danger of the employees' voting themselves "into a sea of trouble"—we rely on the numerous specific threats of job loss and benefit loss uttered by the company supervisors before that letter was sent. In that context, those general warnings did not enjoy the protection of Sec. 8(c) of the Act. We adopt the judge's unlawful promise of benefits finding. We note, as did the judge, that the March 30 letter was followed by another letter 2 weeks later, after the cancellation of the election, in which the Respondent informed one of the leaders of the union campaign, inter alia, that warning notices previously issued to employees were being removed and meetings between management and employees would be regularly scheduled. In these circumstances, we cannot dismiss as "vague" the Respondent's preceding promises to "work out our problems" and "do it easier and better without the union." Rather, we find, in agreement with the judge, that the Respondent's subsequent conduct confirms that the March 30 letter was a promise of benefits calculated to induce employees to reject union representation and thus violative of Sec. 8(a)(1).

The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In sec. IV,A,1, of his decision entitled "Alleged Interrogations and

Wood commenced its takeover of predecessor Bowlby by discriminatorily refusing to hire known union activists and by committing that violation through Production Manager Thomas Greene, who had held the same position with the predecessor. Thus, whatever might be the case had the Respondent General Wood wiped the slate clean and hired an entirely new managerial and supervisory complement, the employees here had received the plain message that supporting the Union was a dangerous proposition regardless of who the employer was. Compare *NLRB v. Cott Corp.*, 578 F.2d 892 (1st Cir. 1978), denying enf. to 232 NLRB 312 (1977) (finding extension of *Gissel* obligation to successor inappropriate where successor hired all the predecessor's employees, remedied all the predecessor's 8(a)(3) and (1) violations, and committed no violations of its own aside from its alleged unlawful failure to bargain with the union).

With respect to the question whether union majority was validly established by a majority of signatures on a petition that stated agreement to be represented by the AFL–CIO and/or an appropriate affiliate, we rely on the following: (1) the credited evidence that after signatures were obtained on that petition, a subsequent meeting was held at which employees voted to be represented by the Union; (2) the execution in mid-March by the Union and Respondent Burke-Parsons-Bowlby of an election agreement pursuant to which the Union was to appear on the

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Threats," the judge inadvertently erred in referring to the testimony of "Paul Barnes." The correct reference is "Paul Bowens."

[3] In this Order, the judge recommended the inclusion of a visitatorial clause, authorizing the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure subject to the supervision of the United States court of appeals enforcing the Order. Under the circumstances of this case, we find it unnecessary to include such a clause. See *Cherokee Marine Terminal*, 287 NLRB No. 53 (Jan. 28, 1988). Accordingly, we shall modify the judge's Order to delete this clause.

ballot in the election scheduled for April 6, 1984: (3) the circulation of a letter from President Richard Bowlby to all plant employees commenting that "There has been much said in the past few weeks about the Woodworkers Union" and urging the employees to vote against the Union; and (4) the absence of evidence of attempts by any employee who signed the initial union authorization petition to revoke his authorization. In sum, a majority of employees initially agreed that they were willing to be represented by an affiliate of the AFL—CIO, and it was clear who that affiliate was before the Union made its bargaining demand on Respondent General Wood.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, General Wood Preservation Company, Leland, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(e).

"(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order."

Dated, Washington, D.C. May 12, 1988

James M. Stephens, Chairman

Wilford W. Johansen, Member

Mary Miller Cracraft, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

Cases 11-CA-11282
11-CA-11376
11-CA-11487

BURKE-PARSONS BOWLBY AND ITS SUCCESSOR, GENERAL WOOD PRESERVATIVE COMPANY

and

INTERNATIONAL WOODWORKERS OF AMERICA, AFL-CIO

George S. Carson, Esq., of Winston Salem, NC, for the General Counsel.

Jeffrey P. Sweetland, Esq., of Riverdale, GA, for the Charging Party.

Robert A. Valois, Esq., and Thomas A. Farr, Esq., (Maupin, Taylor, Ellis and Adams) of Raleigh, NC, for the Respondent.

DECISION

Statement of the Case

LAWRENCE W. CULLEN, Administrative Law Judge: This case was heard before me in Wilmington, NC, on 28, 29 and 30 October 1985. The original charge in Case 11-CA-11282 was filed by the International Woodworkers of America, AFL-CIO ("the Charging Party" or "the Union") on 4 April 1984 against Burke-Parsons Bowlby ("Respondent Bowlby" or "Bowlby") and the original complaint was issued by the Acting Regional Director for Re-

gion 11 of the National Labor Relations Board ("the Board") in this case on 11 May 1984 and alleged that Respondent Bowlby had violated Section 8(a)(1) of the National Labor Relations Act ("the Act") by interrogating its employees concerning their union activities, sympathies, and desires and by threatening them with plant closure, loss of jobs, sale of the plant, and unspecified reprisals if they selected the Union as their collective bargaining representative and by promising its employees improved benefits if they abandoned their support of the Union and by engaging in unit packing by transferring employees for the purpose of defeating the Union in the scheduled election. Respondent Bowlby by its answer filed 23 May 1984 denied the alleged violations of the Act. On 8 June 1984 the Regional Director of Region 11 amended the complaint in 11-CA-11282 by deleting the allegation of unit packing. On 5 July 1984 the Charging Party filed an original charge in Case 11-CA-11376 and subsequently filed an amended charge in Case 11-CA-11376 on 7 August 1984. On 14 August 1984 the Regional Director for Region 11 filed an Order Consolidating Cases 11-CA-11287 and 11-CA-11376 alleging that Respondent Bowlby had violated Section 8(a)(1) of the Act by interrogating its employees concerning their union activities, sympathies, and desires, and by threatening its employees with loss of benefits, loss of jobs, subcontracting of work, sale of the plant, and unspecified reprisals if they selected the Union as their collective bargaining representative and by threatening its employees with plant closure because of their union activities and by promising its employees improved benefits if they abandoned their support of the Union and by engaging in unit packing by transferring employees for the purpose of defeating the Union in the scheduled election. On 22 August 1984 Respondent Bowlby filed its answer in Cases 11-CA-11282 and 11-CA-11376 denying the alleged violations of the Act. On 29 October 1984 the Charging Party filed an original charge in Case 11-CA-11487 against Respondent

Bowlby and its successor and Party-In-Interest, General Wood Preservative Co. ("Respondent General Wood" or "General Wood"). On 14 December 1984 the Acting Regional Director for Region 11 filed a second Order Consolidating Cases 11-CA-11282, 11-CA-11376 with Case 11-CA-11487 and a consolidated complaint in these cases and added General Wood as a Respondent in these cases as an alleged successor of Bowlby. The consolidated complaint in Cases 11-CA-11282, 11-CA-11376, and 11-CA-11487 alleges that Bowlby interrogated employees concerning their union activities, sympathies, and desires, threatened its employees with loss of benefits, loss of jobs, subcontracting of work, sale of the plant, and unspecified reprisals if they selected the Union as their collective bargaining representative, threatened the employees with plant closure and blacklisting because of their union activities, engaged in unit packing by transferring employees to its Leland, North Carolina facility for the purpose of defeating the Union in the scheduled election, and since on or about February 1984 more stringently enforced work rules and policies because of employees' union activities, all in violation of Section 8(a)(1) of the Act. The complaint further alleges that Respondent Bowlby issued written warnings to certain of its employees because of their union activities in violation of Section 8(a)(1) and (3) of the Act. The complaint further alleges that Respondent General Wood refused to hire certain former employees of Respondent Bowlby because of their union activities in violation of Section 8(a)(1) and (3) of the Act. Respondent Bowlby by its amended answer filed 24 December 1984 denied the commission of the alleged violations of the Act. Respondent General Wood by its answer filed 3 January 1985 denied that it was a successor to Burke-Parsons and denied the commission of any of the alleged violations of the Act. On 30 August 1985 the Regional Director for Region 11 issued an amended consolidated complaint in Cases 11-CA-11282, 11-CA-11376, and 11-CA-11487 setting out the aforesaid

allegations listed above in the original consolidated complaint in Cases 11-CA-11282, 11-CA-11376, and 11-CA-11487 and added allegations that since on or about 8 February 1984 a majority of the employees of Respondent Bowlby in an alleged appropriate unit designated and selected the Union as their representative for the purpose of collective bargaining with Respondent Bowlby and that since that date the Union has been the exclusive collective bargaining representative of the employees in said unit and has requested Respondent Bowlby since 9 February 1984 and has requested Respondent General Wood since 22 June 1984 to recognize and bargain with the exclusive collective bargaining representative of the employees in the unit but that said Respondents Bowlby and General Wood have refused and failed to do so. The complaint also alleges that the alleged unfair labor practices are so serious and substantial in character and effect as to warrant the entry of a remedial order requiring Respondent Bowlby and General Wood, its successor, to recognize and bargain with it as the collective bargaining representative of its employees in the aforesaid unit. Respondent Bowlby by its answer filed on 9 September 1985 as amended on 25 October 1985 and Respondent General Wood by its answer filed on 13 September 1985 have denied the commission of the alleged violations of the Act.

Upon the entire record, including my observations of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Respondent, I make the following:

Findings of Fact[1]

I. Jurisdiction

The complaint alleges, Respondent Burke-Parsons Bowlby admits, and I find that it has been at all times

[1] The Findings of Fact include a composite of the testimony of the witnesses and of admitted exhibits.

material herein a West Virginia corporation operating a facility in Leland, North Carolina, where it was engaged in wood treatment, that during the 12 months prior to 30 June,[2] a representative period, it received at its Leland, North Carolina facility goods and raw materials from points directly outside the state of North Carolina valued in excess of $50,000, and in the course and conduct of its operations derived gross revenues in excess of $500,000, and that it is now and has been at all times material herein, an employer in commerce within the meaning of Section 2(6) and (7) of the Act.

The complaint alleges, Respondent General Wood Preservative Company admits, and I find that it has been at all times material herein, a North Carolina corporation with a facility located in Leland, North Carolina, where it is engaged in wood treatment and that during the 12 month period preceding the filing of the complaint, a representative period, in the course and conduct of its operations, it received at its Leland, North Carolina facility goods and raw materials valued in excess of $50,000 from points directly outside the state of North Carolina and derived gross revenues in excess of $500,000. On the basis of the foregoing admitted facts and the record as a whole, I find that Respondent General Wood has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization

The complaint alleges, Respondents admit, and I find that International Woodworkers of America, AFL-CIO, is and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

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[2] All dates are in 1984 unless otherwise stated.

III. The Bargaining Unit

The complaint alleges, and I find on the basis of the evidence adduced at the hearing through the testimony of Respondent Bowlby's former Production Manager Thomas P. Greene, who had at all material times served as Respondent General Wood's production manager, and on the basis of the testimony of Steve Hutchinson, Respondent General Wood's operations manager, and on the basis of the record evidence, specifically General Counsel's Exhibits 38 - 41, and on the basis of the unit originally stipulated to by Respondent Bowlby for purposes of the scheduled April election, that the following employees of Respondent Bowlby and its successor General Wood constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

> All production and maintenance employees employed at the Employer's Leland, North Carolina facility, excluding office clerical employees, technical employees, professional employees, guards and supervisors within the meaning of the Act.

IV. The Alleged Unfair Labor Practices

In February, certain of the production and maintenance employees of Bowlby engaged in a walkout. Shortly thereafter, in February the employees contacted the Industrial Union Department (IUD) of the AFL-CIO and met with Michael Black, the coordinator of the IUD. The employees at that meeting signed petitions seeking union representation. According to the unrebutted testimony of Black which I credit, he told the employees he would need to check to determine which union would best represent their interests and at a subsequent meeting the employees at that meeting agreed by a unanimous voice vote to select the International Woodworkers of America, AFL-CIO, as their collective bargaining agent on the basis of Black's recommendation. Several of the employees testified that

after the advent of the Union's campaign in February they were interrogated, threatened and promised benefits by Respondent Bowlby and that they were disciplined for various alleged infractions and that shortly prior to the scheduled April election, Respondent Bowlby brought in employees from other facilities to vote in the election, (thus attempting to "pack" the unit in order to dissipate the Union's majority and defeat the Union's campaign at the upcoming election which had been scheduled for 6 April). The Union filed charges thus blocking the election. The General Counsel contends that the Union represented a majority of employees in February based on their signing of the petitions at the meeting held by Black in February and on the basis of other petitions signed by other employees. The General Counsel also contends that Respondent General Wood is a successor to Bowlby having completed a transaction for the purchase of assets, including equipment and materials and having taken over the physical facilities of Bowlby and having hired the majority of its employees and of the supervisors from Bowlby and having acquired and engaged in the same business of treating wood with preservatives for sale to the same customers. The General Counsel contends that based on the signatures obtained in February, the Union had a majority of employees who desired union representation and that a bargaining order should be entered against Bowlby because of its flagrant and hallmark violations, particularly that of unit packing and threats of plant closure, sale of the business, and subcontracting, and that General Wood acquired the assets and liabilities of Bowlby with full knowledge of the alleged unfair labor practices of Bowlby and further continued the unfair labor practices by its refusal to hire former Bowlby employees who presented themselves for hire because of their support for the Union and that General Wood should be ordered to remedy its unfair labor practices against those employees it failed or refused to hire and further should be ordered to bargain

with the Union as a result of the unfair labor practices committed by Bowlby and of which General Wood had knowledge and continued by General Wood as those violations have the inevitable effect of dissipating the Union majority.

A. The alleged Section 8(a)(1) and (3) violations of Bowlby

The General Counsel presented as witnesses a number of employees who testified that they had been interrogated and/or threatened with reprisals concerning their support for the Union by various supervisors and/or members of management of Respondent Bowlby. Although Respondent Bowlby filed an answer in this case consisting principally of a general denial of the commission of the unfair labor practices alleged against it, no one appeared or participated in the hearing on its behalf. The supervisors and/or members of management alleged to have engaged in the interrogation or threats were not called. The employees' unrebutted testimony concerning these events is set out below:

1. Alleged Interrogations and Threats

(a) Larry Brown who had worked at Bowlby since June 1983 and who was employed as a "pole classer" testified that in the second or third week of March his supervisor Gary Wood told him "if we was to get the union in, we would lose all seven paid holidays and we would have to start all over from scratch again." Brown replied "there was no way we could," and Wood retorted "we could too."[3] Larry Brown further testified that on Tuesday, 3 April, Plant Manager Carl Williams told Brown and several other employees that "if the union was to come in, we might as well start looking for another job and so

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[3] The transcript at R. 32, l. 13 is hereby corrected to read "He said *we* could too."

would he." Larry Brown's testimony concerning the 3 April incident involving Williams was corroborated by Michael Robinson, a mill operator who had been employed at Bowlby between February and 30 April when he and a number of other employees were laid off as a result of lack of work. Robinson testified that Williams told him and several other employees that if the Union were voted in, everyone, including himself, would probably be looking for another job. The testimony of Larry Brown and Michael Robinson was further corroborated by Paul Barnes who had been employed at the pole machine from February or March through April and who testified that on 3 April he and Larry Brown and Robinson were at the pole machine and someone said "union time" and Williams said that "we don't want no union in because if you do, me and you, all of us, we might as well be looking for a job."

(b) Warren Bryant, a forklift operator who had worked for Bowlby from August 1979 to June 1984 testified on 28 or 29 February his supervisor Jimmie Smith asked him and employee Alexander Hall whether they were for the Union, and both said yes, and that Smith then told them he had promised himself that he would quit before he belonged to a union. Bryant replied, "You just as well get ready to quit because we are going to get one anyhow." Bryant testified further that Smith then said "that everybody get ready to plant a garden because we was all going to be on the soup line," and also stated that "they would close the plant down before the union would come in." Smith also told them that Winbourne (Stanley Winbourne, the owner and president of General Wood and a former Bowlby employee) was going to buy the plant. The testimony of Bryant concerning the remarks made by Supervisor Jimmie Smith was corroborated by local sales employee Alexander Hall who testified that Jimmie Smith walked up to him and asked what he thought of the Union, to which Hall replied that he was all for it. Smith then told him it would not work, that "they" would sell the

plant before they had a union in it and that Hall had best plant a garden and stock up on soup. Hall testified that Bryant and another employee then walked up and Smith repeated these comments to them. Bryant also testified that on 10 April, Jimmie Smith told Bryant the employes would lose benefits if the Union came in and specifically mentioned the loss of "Boot money" as a benefit to be lost.

(c) Oliver Munn, a forklift operator in the framing department who had been employed by Bowlby from October 1979 to June 1984 testified that on 4 April he was walking alongside Supervisor Jimmie Smith and Tom (Thomas) Greene (Bowlby's production manager) and employee Palmer Hatcher, and Hatcher yelled out "What time is it?" Munn responded "union time" and Smith said "you'all are going to wind up in the soup line."

(d) George Jenkins, a pole machine operator, who was employed by Bowlby in 1983 testified that in February Smith asked him what he thought of the Union, and he told Smith he hoped the Union got in for better benefits.

(e) John Ganey, a forklift operator and pole bander, who was employed by Bowlby since 1979, testified that in March his supervisor, Percy Burns, told him that if we kept going the way we were with the Union, the place was going to shut down.

(f) Greg Burton, a boiler room employee who had been employed by Bowlby since May 1982, testified that in late March, Supervisor Bill Caldwell told him that when you sit down to bargain you lose all existing benefits to which Burton replied this was not true.

(g) Employees Michael Robinson and Paul Bowens testified concerning a meeting held by Respondent Bowlby's president, Richard Bowlby, and Plant Manager Carl Williams at which Bowlby was questioned concerning threats by Williams and testified that Bowlby told them he would

ship his poles out where he could get them peeled cheaper if the Union came in.

Analysis

I credit the unrebutted testimony of these employees. I find that the statement of Supervisor Gary Wood to Larry Brown that the employees would lose paid holidays and would have to start from scratch again if the Union were selected by the employees was an unlawful threat and that Respondent Bowlby violated Section 8(a)(1) thereby. I find that the statement of Plant Manager Carl Williams to employees Larry Brown, Michael Robinson, Paul Bowens, and several other employees that they and he might as well look for another job if the Union came in was an unlawful threat of plant closure and the loss of their jobs, and that Respondent Bowlby violated Section 8(a)(1) of the Act thereby. I find that the statements made by Supervisor Jimmie Smith to employees Warren Bryant and Alexander Hall that if the Union were to come in everyone should plant a garden because they were going to be on the soup line and that the plant would be closed before the Union would come in were unlawful threats of job loss and plant closure and that Respondent Bowlby violated Section 8(a)(1) of the act thereby. I find that the statement made by supervisor Jimmie Smith to employee Warren Bryant that the employees would lose benefits and specifically mentioning "Boot money" if the Union were to come in was an unlawful threat of loss of benefits and that Respondent Bowlby violated Section 8(a)(1) of the Act thereby. I find that the statement of Supervisor Jimmie Smith following Munn's reference to "union time" that the employees were all going to end up in the soup line was an unlawful threat of job loss and that Respondent thereby violated Section 8(a)(1) of the Act. I find that Smith's interrogation of employee George Jenkins concerning what he thought of the Union was unlawful as it did not occur in an environment free of unfair labor prac-

tices but was part of an overall campaign of interrogation and coercion by Bowlby and that Respondent Bowlby violated Section 8(a)(1) of the Act thereby. I find that the statement of Supervisor Percy Burns to employee John Ganey that if the employees kept going the way they were with the Union, the place would shut down, was an unlawful threat of plant closure and that Respondent Bowlby violated Section 8(a)(1) of the Act thereby. I find that Supervisor Bill Caldwell's statement to employee Greg Burton that when you sit down to bargain you lose all benefits was an unlawful threat of loss of benefits if the employees selected the Union, and that Respondent Bowlby violated Section 8(a)(1) of the Act thereby. I find that the statement of President Richard Bowlby that if the Union came in he would ship poles out and get them peeled cheaper was an unlawful threat of subcontracting work if the Union were selected by the employees and that Respondent Bowlby violated Section 8(a)(1) of the Act thereby.

B. The 30 March Letter from President Richard Bowlby to the Employees

In his 30 March letter to the employees, Bowlby states "There are no problems that exist in this plant that we cannot work out among ourselves without the high risk the union brings. This much I promise you—we will work out our problems—we will do this with or without the union. We can do it easier and better without the union." He further stated in the letter, ". . . think carefully about this union and what it can cost you. You know what you now have. Don't vote yourself into a sea of trouble." On 13 April, Richard Bowlby directed a letter to employee Gregory Burton who was one of the leaders of the Union campaign among the employees. This letter followed the cancellation of the scheduled 7 April election. In the 13 April letter Bowlby informed Burton that warning notices previously issued to employees were being removed, meet-

ings between management and the employees would be regularly scheduled and that employees could call or write him at anytime.

Analysis

I find that the promise of Richard Bowlby to "work out our problems" was an unlawful promise of benefits in order to induce the employees to reject union representation as demonstrated by Bowlby's letter to Burton and that Respondent Bowlby thereby violated Section 8(a)(1) of the Act. I find that Bowlby's reference to the "high risk" the Union would bring and his statement that the employees should not "vote yourself into a sea of trouble," were unlawful unspecified threats of reprisal if the employees chose union representation and that Respondent Bowlby thereby violated Section 8(a)(1) of the Act.

2. The Warnings and Suspension

The General Counsel introduced evidence through the testimony of several employees who supported the Union's campaign and who had engaged in the walkout in February that they received warnings and suspensions. Respondent Bowlby's Production Manager Thomas Greene who had commenced his own employment with Bowlby in December 1983, contended that he initially commenced issuing disciplinary warnings in January after he settled into his new job and had an opportunity to observe the employees. However, as the General Counsel points out in his brief there was no evidence of the disciplinary actions taken by Greene until after the February 1984 walkout by the employees. Rather, the evidence showed that warnings and in one case a suspension were issued to known union supporters.

(a) Warren Bryant engaged in the February walkout by employees, signed the union petition, wore a "Vote Yes" pin for about a week, and discussed the Union with other

employees in the shipping yard and told them to support the Union for better conditions.

On 21 May, Bryant was absent as a result of car trouble and called his foreman, Jimmie Smith, who told him to hurry up and come in. He was unable to get the car fixed and reported the next day and was called into the office by Greene who issued him a written warning for not reporting to work. He told Greene he had called Jimmie Smith and Greene told him he should have come in anyway. Bryant told Greene he had no transportation and Greene said it was Bryant's problem. Bryant testified he had never before received a warning for an excused absence. The record evidence shows that employees received warnings only in those instances when they did not call in as shown in the warnings issued to Larry D. Brown and Gregory Burton.

(b) Warren Jacobs engaged in the February walkout, attended several union meetings, signed the union petition, passed out union leaflets at the plant gate, and obtained the signatures of several other employees on the Union's petition. His supervisor, Percy Burns, was aware of his support for the Union. On 21 May, Jacobs received a written warning from Greene for being late although he had brought a doctor's excuse. He was unaware of any prior case where an employee was issued a warning when he had a doctor's excuse.

(c) George Jenkins attended the union meeting in February and signed the union petition. He also discussed his support for the Union with employees at work and with his supervisor, Kenny Smith, who had asked him what he thought about the Union. He told Smith he "hoped they got the union in so that it would help in paying better benefits."

On 27 February he stopped the pole machine he was operating because it was raining hard. His supervisor, Kenny Smith, asked why the machine was stopped, and

he told him because it was raining too hard. Smith then told him he could wait five or ten minutes until the rain slackened to restart the machine. On 28 February he received a written warning from Production Manager Greene for being "unwilling to work due to the weather conditions."

On 2 March the employee he rode to work with became ill and he asked Smith if he (Jenkins) could leave work early with the other employee and Smith agreed. The next day Smith told him to see Greene who then told him to work harder and faster. On cross-examination he testified that when he had asked to leave early, Smith told him to see Greene who told him to drive his own car every day as he needed him at work, and he then left with the other employee.

When Greene was questioned by the General Counsel concerning the rain incident, he testified that other employees had not walked off because of the rain but later acknowledged that he was not certain what had happened as he was not there at the time.

(d) Greg Burton was one of the initial leaders of the union movement among Respondent Bowlby's employees and an active participant as a representative on behalf of its employees. Burton was involved in the walkout of February. It was Burton who initially contacted Mike Kryvosh of the Industrial Union Department (IUD) of the AFL-CIO and later met with Michael Black, a coordinator for the IUD at the International Longshoremen Association's union hall. Burton signed the union petition and was designated as the spokesman for the employees who signed the petition. He clipped signs on, wore t-shirts saying 100 percent union and spoke in plant meetings held by Williams and Greene. He solicited and obtained the signatures of other employees on the petition for the Union. On one occasion in March he spoke to Greene on behalf of employee Alonzo Green and told Tom Greene he was "ready

to file." Tom Greene responded there was no union and he told Greene there were a majority of employees in favor of the Union, and they were a union whether Greene recognized the Union or not. Greene responded that "some people are leaders, some followers and some agitators." Burton also met with President Bowlby concerning the employees' complaints in April, and Bowlby replied to Burton in his letter of 13 April wherein he addressed a number of items complained of by Burton and informed Burton that there was a communication problem between Burton and the Company and urged that channels of communication outlined in the letter be kept open.

On 13 June Tom Greene gave Burton a written warning (G.C. Exh. 30) issued on 12 June setting out days that Burton had been late or absent including an early leave of 11 June. Burton testified that he had received permission to leave early on 11 June from his supervisor, Ted Sweeney, and from Greene. Immediately after issuing the written warning to Burton on 13 June, Greene filled out a written 3-day suspension (G.C. Exh. 31) on Burton for his failure to show up for work on 12 June and also based on the written warning of 12 June which he had first handed to Burton. Greene acknowledged on cross-examination that he did not recall discussing with Burton the circumstances of the early leaves on 7 and 11 June, and conceded that Burton had called in on one occasion of being late.

Analysis

I find that the General Counsel has made a prima facie case that the warnings issued to four known union supporters—Bryant, Jenkins, Jacobs, and Burton—and the suspension issued to Burton were motivated by the demonstrated animus of Respondent Bowlby directed against the Union as evidenced by the unlawful 8(a)(1) conduct by Bowlby as found supra. As the General Counsel points out in his brief, these actions were taken after the

advent of the union campaign and showed Respondent Bowlby's marked interest in enforcing rules against these employees which had not been enforced in the past. As Respondent Bowlby did not appear and the testimony of the employees was unrebutted with the exception of the testimony of Greene who ultimately conceded he was not familiar with the circumstances leading to certain of the disciplinary actions, I find that Respondent Bowlby has failed to rebut the prima facie case established by the General Counsel.

I find that the warnings issued to employees Jenkins, Bryant, and Jacobs and the warnings issued to Burton on 12 June were discriminatorily motivated and that Respondent Bowlby thus violated Section 8(a)(3) and (1) of the Act. As the 3-day suspension issued to Burton by Greene on 13 June was in part based on the unlawful warning issued on 12 June, I find that the suspension was also unlawful and that Respondent Bowlby also violated Section 8(a)(3) and (1) of the Act thereby. I further find based on the foregoing that Respondent Bowlby's enforcement of its rules as set out above and as referenced in the letter by President Bowlby to Burton was violative of Section 8(a)(1) and (3) of the Act. The record as a whole reflects that Respondent Bowlby had not routinely or systematically enforced its rules concerning tardiness, absenteeism, and work performance in the past until the advent of the Union's campaign. The unrebutted testimony of the employees concerning the enforcement of these rules after the advent of the Union's campaign as contrasted with no evidence of their enforcement in the past and as referenced in Richard Bowlby's letter of 13 April and the evidence of Bowlby's union animus has demonstrated by a preponderance of the evidence that Respondent Bowlby's sudden enforcement of long ignored rules was discriminatorily motivated as a response to the Union's campaign and I find that Respondent Bowlby thereby violated Sec-

tion 8(a)(1) and (3) of the Act. *D. V. Copying and Printing, Inc.*, 240 NLRB 1276, 1286 (1979).

3. The Unit Packing Allegations

It is clear from the evidence that as of 12 February at the advent of the union campaign, the appropriate bargaining unit consisted of no more than 64 employees. Respondent Bowlby's management and supervisors interrogated and threatened its employees concerning their union sympathies. It then brought in approximately 25 employees from West Virginia, Kentucky, Ohio, and Virginia and placed them on its list of employees to vote in the scheduled representation election.

Both employees Alexander Hall and Greg Burton discovered through conversations with certain of these imported employees that they were brought in for the express purpose of voting in the scheduled 6 April representation election and would leave the day following the election. As a result of charges filed by the Union, the election was blocked and all but four of the employees left on 7 April as testified to by Burton and as demonstrated by the lack of working hours accorded to these employees on subsequent lists of employees that continued to carry their names.

During the period of their employment at the Leland plant, the imported employees were segregated from the other employees and were housed in a motel paid for by Respondent Bowlby, were fed from specially catered trucks, and were not required to wear shirts or hard hats as required of other employees.

Analysis

Based on the foregoing unrebutted testimony and the record as a whole, I find that Bowlby engaged in unit packing in an attempt to capture the election and thus

violated Section 8(a)(1) of the Act. I also find as alleged and contended by the General Counsel that unit packing is a hallmark violation as it is an attack on the entire election process and the essential freedom of choice required for fair elections and is analogous to fraudulent voter registration in public elections. *Maxi Mart*, 246 NLRB 1151 (1979).

C. The Alleged Refusals to Hire by Respondent General Wood

The complaint alleges and the General Counsel contends that employees Charles Brown, Oliver Munn, George Jenkins, Warren Bryant, Freddie Brown, John Ganey, and Greg Burton were not hired by Respondent General Wood because they joined or assisted the Union or engaged in other union or concerted activities with other employees for the purpose of collective bargaining and mutual aid and protection. The evidence as set out, supra, reveals that these employees signed the petition and were open union supporters.

Several of the employees had been interrogated or threatened and issued warnings. Burton had been suspended. On 20 June Stanley Winbourne, president of General Wood and a former official of Bowlby, addressed Bowlby's employees and announced that Respondent Bowlby had been purchased by General Wood, that there would be a brief cessation of work and a shutdown of the plant of approximately 2 weeks, and that the plant would be reopened by General Wood in early July. He assured all of the employees that they would be hired by General Wood and that they should file applications in early July. He also told them that he was not in favor of the Union, but that the decision was up to them. He also told them they would start with clean slates, that their benefits would not be reduced, and if General Wood did well they would be buying new cars each year. Subsequently, on 28 June the Union sent a mailgram to Winbourne stating its con-

tinued majority interest, advising of the commission of the aforementioned unfair labor practices, and making a demand for recognition.

The record evidence reveals that the seven alleged discriminatees applied for employment in early July with General Wood as requested by Winbourne on 20 June but had not been hired to the date of the hearing although General Wood hired approximately 25 employees from Bowlby's employee complement in the unit, 10 of a total of 12 of whom had not signed the union petition. Only two employees who had not signed the petition were not hired whereas only four of the 26 employees who had signed the initial union petition at the February meeting were hired. After the establishment of the initial core of employees, General Wood commenced to hire new employees, most of whom had no prior experience at a wood treatment plant and ignored the remainder of the experienced employee complement.

The record demonstrates that the seven alleged discriminatees litigated at the hearing were experienced employees and most had performed more than one job. Their testimony, which I credit, demonstrates that they had generally not been the subject of disciplinary action with the exception of the warnings and suspension found unlawful, supra. Thus, Bryant had never received a warning or had disciplinary action taken against him concerning his job performance and had worked in the framing department and on the tow line in addition to his duties as a forklift operator. Munn had never been warned or disciplined concerning his work performance. Charles Brown was an experienced pole grader who had trained two or three other employees as pole graders and had never been disciplined concerning his work performance. Freddie Brown was a pole framer who had been employed for 5 years by Bowlby and received only one verbal warning for unsatisfactory job performance on a single occasion. He had been evaluated twice by his supervisor and was never told his work

was unsatisfactory. Jenkins was an experienced pole machine operator. Ganey was an experienced forklift operator and had also banded poles. During his 5 year tenure with Bowlby, Ganey had failed to tighten a plug on one occasion which caused an oil leak and $5,000 damage to an engine. However, he had never received any disciplinary action as a result of his work performance. Burton had served as welder helper, worked in the boiler room for 12 months and only 2 or 3 weeks prior to the 20 June closure of Bowlby had been transferred to the position of pole pointer. There was no evidence that Burton had been disciplined for his work performance with the exception of the warnings and suspension discussed which related to absenteeism and a warning he had received for smoking in a non-designated as opposed to a restricted area.

When the alleged discriminatees filed their applications, none received an interview. When they inquired concerning their prospects, they were referred to Greene who had been hired as the production manager for General Wood. Greene told those who inquired of him that he had no openings. Ganey was told to stay by the phone. None of the seven were recalled to work.

Winbourne did not testify. Greene testified at the hearing that he had recommended against hiring several employees, but that General Wood Operations Manager Steven Hutchinson had made the decisions. This differed from earlier statements he had made to a Board agent during the investigation of this case. At the hearing Greene testified that he did not recall the reason he had given the Board agent for not hiring Burton or Munn. Greene testified at the hearing that he recommended against the hire of Jenkins because of performance problems with Jenkins' work. Greene testified at the hearing that Hutchinson had made the decision not to hire Ganey but acknowledged that when he met with the Board agent investigating the case, he had cited the lack of a second shift as the reason

for not hiring Ganey. Greene had told the Board agent that Freddie Brown had limited flexibility in the framing work. He further acknowledged that at the time he made various representations to the Board agent he was aware that several of these employees had not been considered by Hutchinson for rehire.

Steven Hutchinson, General Wood's operations manager, testified that he followed Greene's recommendation not to hire Jenkins and Charles Brown but that he decided not to hire the other alleged discriminatees based on his observations of them when he had worked at Bowlby from 1973 to 1983 in some cases and because of the condition of equipment operated by them in others.

Analysis

I find that the General Counsel has established a prima facie case that the failure of General Wood to hire the alleged discriminatees was motivated by their engagement in concerted activities in support of the Union's campaign. It is clear that the seven alleged discriminatees were known union supporters, several of whom had been subjected to interrogation and threats and one of whom had been suspended by Bowlby's Production Manager Greene. It is also clear, and I find, that Greene was in charge of the hiring of new employees or at least effectively recommending such hire as General Wood's production manager. I find that the circumstances support the inference that Hutchinson as well as Greene had knowledge of the union activities of the employees of Bowlby. I do not credit the testimony of Greene or Hutchinson that the alleged discriminatees were not hired for work related reasons. I find Greene's testimony to be inconsistent in many respects and his lack of recall and the lack of documentation of the reasons for not hiring these employees to be detrimental to his overall credibility as well as his acknowledgement that when he met with a Board agent in the investigation of this case, he did not inform him that

Hutchinson had allegedly made the hiring decisions as he later testified at the hearing. I also do not credit Hutchinson's testimony that his decisions not to hire these employees were based on his past recollection of them in 1983 and prior thereto and as a result of the condition of equipment operated by certain of the employees. I also rely on the statistics cited by the General Counsel that 10 of the 12 non-signers of the petition were hired whereas only 4 of the 26 signers of the petition were hired and find these statistics show a clear pattern of discrimination against the union supporters. I have also considered the lack of plausibility of Respondent General Wood's contentions and stated reasons for not hiring the alleged discriminatees (all of whom were experienced employees and the resort to new employees most of whom were inexperienced in General Wood's business). I thus find that Respondent General Wood has failed to rebut the prima facie case established by the General Counsel, and I find by a preponderence of the evidence that Respondent General Wood violated Section 8(a)(3) and (1) of the Act by its refusal to hire as employees Charles Brown, Oliver Munn, George Jenkins, Warren Bryant, Freddie Brown, John Ganey, and Greg Burton. *Wright Line*, 251 NLRB 1083 (1980); *Rouse Bertrand Dupont, Inc.*, 271 NLRB 443 (1984); *Douglas, Inc.*, 227 NLRB No. 123 (1985). See also *Chaim Babad, et al, a Co-Partnership, d/b/a Tilden Arms Management Co. and Toby Estates, Inc., a Single Employer*, 276 NLRB No. 117 (1985). See also *Spencer Foods*, 268 NLRB 1483, 1486 (1984), enfd. in relevant part 119 LRRM 3473 (D.C. Cir. 1985), Re: subjecting former employees to more rigid standards than new applicants in hiring evaluations.

D. The Majority Issue

The record established that as of 12 February there were 64 employees in the appropriate unit as derived from the payroll register of that date listing a total of 86 per-

sons minus 21 persons identified by Production Manager Greene as supervisors, office clericals, guards, a procurement forester, a quality control inspector, and a dispatcher at the hearing. The signatures of forty-two of the employees were authenticated on the petitions through the identification of their signatures by the employees themselves, by witnesses who saw the employees place their signatures on the petition, by the comparison of handwriting samples by the undersigned at the hearing, and by the testimony of the IUD coordinator, Black, who testified concerning the signatures of the employees at a meeting held in February for the purpose of organizing a union. The single purpose authorization petition states that the employees authorize the AFL-CIO or its appropriate affiliate to represent them in collective bargaining with their employer. At a subsequent meeting, according to the unrebutted testimony of Black which I credit, the employees chose the Woodworkers Union as their designated union. There was no evidence of any employee's attempt to revoke his signature. The lack of designation of the Union at the initial time of signing is not a legal impediment to the obtainment of majority status. The authenticated signatures of 42 of the 64 employees in the appropriate unit of February clearly gave the Union a majority and I so find. *Burlington Industries, Inc.*, 257 NLRB 712 (1981).

E. The Bargaining Order

I find that a bargaining order should issue against Respondent Bowlby in view of Bowlby's unlawful interrogation, threats, disciplinary warnings and a suspension of its employees, and most significantly in its packing of the unit by importing employees to subvert the election process which dissipated the Union's majority, and also in view of the threats of plant closure, subcontracting out of work, and job loss engaged in by Respondent Bowlby including its threat of subcontracting and that of unspecified

reprisals issued by its president. The threats of plant closure, job loss, and subcontracting, as well as the unit packing, clearly constitute hallmark violations. The combination of these hallmark violations and the impossibility of remedying these violations by Bowlby as a result of its sale of the plant clearly demonstrate that it is no longer possible to conduct a free and fair election. *Regency Manor Nursing Home*, 275 NLRB No. 171, fn. 3 (1985); *Maxi Mart*, supra, at fn. 4.

F. The Successor Issue

The undisputed evidence clearly establishes that General Wood is engaged in the same business of chemically treating wood including telephone poles, fence posts, pilings, and other items and sells to substantially the same customers as Bowlby. By the sale of the assets of Bowlby to General Wood on 29 June, General Wood purchased and received the physical facility and plant including production equipment and vehicles and inventory. General Wood commenced production on 9 July and by the end of July had hired employees in virtually all pre-existing production and maintenance classifications of its predecessor Bowlby. Over 60 percent of General Wood's employees had been employed at Bowlby, and the supervisory force remained virtually unchanged from that of Bowlby including the retention of Greene as production manager. I thus find that General Wood is a successor of Bowlby. *Aircraft Magnesium*, 265 NLRB 1344 (1982). I also find that General Wood obtained successorship status at least by the end of July when it had hired employees in the pre-existing classifications and employed a complement of 44 unit employees. I reject Respondent General Wood's contention that the relevant date for examining the employee complement should be 18 September when it expanded the number of its shifts as this expansion was highly uncertain in July according to the testimony of Greene. *Indianapolis Mack Sales and Service, Inc.*, 272 NLRB 690 (1984). See also

Metropolitan Teletronics Corp., 279 NLRB No. 134, fn. 16 (1986).

G. The Bargaining Obligation of General Wood

Unrebutted documentary evidence of the mailgram sent by the Union and the testimony of the employees as set forth above concerning the remarks made by Winbourne on 20 June to the employees concerning the Union clearly establishes that General Wood had actual notice of the unfair labor practices of Bowlby prior to its purchase from Bowlby. Moreover, the knowledge of Bowlby's Production Manager Greene thereof, who was hired by General Wood in the same capacity, is imputed to General Wood.

As the General Counsel contends, it is well settled that a successor may be ordered to remedy the unfair labor practices of its predecessor, citing *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973); and that in appropriate cases the Board has required successor employers to abide by *Gissel* orders issued against predecessors particularly in cases wherein the successor's conduct is a continuation of the predecessor's campaign to erode the Union's majority status, and this is so even in those cases wherein no prior bargaining order had been issued against the predecessor, citing *Carlton's Market*, 243 NLRB 837, 845 (1979), enfd. 642 F.2d 350 (9th Cir. 1981).

In the instant case the acts of General Wood by unlawfully refusing to hire known union adherents as found herein were clearly calculated to subvert the election process in order to assure a lack of union support. The passage of time and the turnover of supervisory personnel at General Wood do not serve to obliterate its bargaining obligation as a successor. *Keystone Pretzel Bakery*, 256 NLRB 334, 335 (981), enfd. 696 F.2d 257 (2nd Cir. 1983). I find a bargaining order should issue against General Wood as a successor of Bowlby in this case. See also *Chaim Babad, et al*, supra.

H. The Effects of the Unfair Labor Practices Upon Commerce

The unfair labor practices of Respondents Bowlby and General Wood as found herein have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Conclusions of Law

1. Respondents Burke-Parsons Bowlby and General Wood Preservative Company are each employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and General Wood Preservative is a successor to Burke-Parsons Bowlby.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By the interrogation and threats issued to its employees and unlawful promises of benefits by engaging in unit packing found herein, Respondent Bowlby violated Section 8(a)(1) of the Act.

4. By the disciplinary warnings issued to its employees George Jenkins, Warren Bryant, Warren Jacobs, and Greg Burton as found herein and by the suspension of its employee Greg Burton, and by the more stringent enforcement of its work rules, Respondent Bowlby violated Section 8(a)(3) and (1) of the Act.

5. The appropriate unit of the employees of Respondent Bowlby and its successor General Wood is:

> All production and maintenance employees employed at the Employer's Leland, North Carolina, facility; excluding office clerical employees, technical employees, professional employees, guards and supervisors within the meaning of the Act.

6. As of 12 February 1984 the Union represented a majority of the employees of Respondent Bowlby in the aforesaid appropriate unit.

7. Respondent General Wood Preservative Company violated Section 8(a)(3) and (1) of the Act by its refusal to hire employees Charles Brown, Oliver Munn, George Jenkins, Waren Bryant, Freddie Brown, John Ganey and Greg Burton.

8. The above violations as found herein have an effect upon commerce within the meaning of the Act.

The Remedy

Having found that Respondents Bowlby and its successor General Wood have engaged in certain unfair labor practices, I shall recommend that they cease and desist therefrom and take the following affirmative actions, including posting of an appropriate notice, designed to effectuate the policies of the Act.

Having found that Respondent Bowlby violated Section 8(a)(3) and (1) of the Act by its issuance of written warnings to its employees and by the suspension of Greg Burton, it and General Wood as its successor shall be ordered to expunge its personnel records of any reference to said warnings and suspension and to make Greg Burton whole for any loss of earnings or benefits sustained as a result of his suspension. Having found that Respondent General Wood unlawfully failed and refused to hire employees Charles Brown, Oliver Munn, George Jenkins, Warren Bryant, Freddie Brown, John Ganey, and Greg Burton because of their union activities, Respondent General Wood shall be ordered to offer to hire said employees. Respondent General Wood shall also make the aforesaid employees whole for any loss of earnings or benefits suffered as a result of the discrimination against them, with interest thereon to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950); and *Florida*

Steel Corporation, 231 NLRB 651 (1977). See generally, *Isis Plumbing and Heating Company*, 138 NLRB 716 (1962).

I recommend that General Wood should be ordered to bargain with the Union in order to remedy the violations committed by its predecessor Bowlby which had the effect of dissipating the attained majority status of the Union and rendered impossible the holding of a free and fair election and which violations were continued by General Wood by its unlawful refusal to hire union supporters as found herein.

I also find under the circumstances of this case involving threats of plant closure, loss of jobs, subcontracting, warnings and suspensions, and unit packing by Bowlby in order to dissipate the Union's majority and the ultimate shutdown and sale of the business to General Wood and the continuation of the unfair labor practices by General Wood, that a visitorial order is appropriate to ensure that the unfair labor practices are fully and promptly remedied, including the order to hire the discriminatees with backpay. See *Hilton Inn North*, 279 NLRB No. 9 (1986).

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended:

ORDER[4]

Respondent General Wood Preservative Company, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

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[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Coercively interrogating employees concerning their union sympathies.

(b) Threatening its employees with plant closure, subcontracting, job loss, loss of benefits, or unspecified reprisals if they engage in union activities.

(c) Promising employees that their problems would be worked out within the Union.

(d) Issuing disciplinary warnings or suspensions to its employees and more stringently enforcing work rules because of their support for the Union.

(e) Packing the bargaining unit with other employees in order to dissipate the Union's majority.

(f) Refusing to hire employees because of their union activities and sympathies.

(g) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies and purposes of the Act.

(a) Upon request, recognize and bargain collectively with International Woodworkers of America, AFL-CIO, as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and if an understanding is reached embody the understanding in a signed agreement. The appropriate unit is:

> All production and maintenance employees employed at the Employer's Leland, North Carolina facility; excluding office clerical employees, technical employees, professional employees, guards and supervisors within the meaning of the Act.

(b) Offer to hire employees Charles Brown, Oliver Munn, George Jenkins, Warren Bryant, Freddie Brown, John Ganey, and Greg Burton.

(c) Expunge from its files any reference to the unlawful warnings issued to employees George Jenkins, Warren Bryant, Warren Jacobs, and Greg Burton and the suspension issued to employee Greg Burton, and notify them in writing of this and that these warnings and suspension shall not be used as a basis for future personnel actions concerning them.

(d) Make whole said employees Charles Brown, Oliver Munn, George Jenkins, Warren Bryant, Freddie Brown, John Ganey, and Greg Burton for its unlawful refusal to hire them and Greg Burton for its unlawful suspension of him with full backpay and benefits with interest in accordance with the recommended "Remedy" with no loss of seniority or other rights and benefits to which they would have been entitled but for the unlawful discrimination against them.

(e) Preserve and, upon request, make available to the Board or its agents for examination and copying all payroll records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order. For the purpose of determining or securing compliance with this Order, the Board or any of its duly authorized representatives may obtain discovery from Respondent, its officers, agents, successors, or assigns, or any other person having knowledge concerning any compliance matter, in the manner provided by the Federal Rules of Civil Procedure. Such discovery shall be conducted under the supervision of the United States Court of Appeals enforcing this Order and may be had upon any matter reasonably related to compliance with this Order, as enforced by the Court.

(f) Post at its facility in Leland, North Carolina, copies of the attached notice marked "Appendix."[5] Copies of said

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[5] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER

notice on forms provided by the Regional Director for Region 11, after being duly signed by Respondent General Wood Preservative Company's authorized representative, shall be posted by it immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 11, in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.[6]

Dated Washington, DC. 30 June 1986

/s/ Lawrence W. Cullen
Lawrence W. Cullen
Administrative Law Judge

OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

[6] Respondent General Wood's motions to dismiss the Section 8(a)(3) allegations against it and for summary judgment with respect to the bargaining order and to strike General Counsel's request for a visitorial provision are denied.

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

> To organize;
> To form, joint, or assist any union;
> To bargain collectively through representatives of their own choosing;
> To act together for other mutual aid or protection;
> To choose not to engage in any of these concerted activities.

WE WILL NOT coercively interrogate employees concerning their union sympathies.

WE WILL NOT threaten employees with plant closure, subcontracting, job loss, loss of benefits, or unspecified reprisals because of their union activities or sympathies.

WE WILL NOT promise employees that their problems will be worked out without the Union.

WE WILL NOT issue disciplinary warnings or suspensions to employees or more stringently enforce work rules because of their union activities or sympathies.

WE WILL NOT engage in unit packing in order to dissipate the Union's support.

WE WILL NOT refuse to hire employees because of their union activities or support.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in their rights guaranteed them under Section 7 of the Act.

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's office, US Courthouse, Federal Building, 251 North Main Street - Room 447, Winston-Salem, NC 27101. Telephone: (919)761-3212.

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL recognize, and on request, bargain with the International Woodworkers of America, AFL-CIO, and embody in a written agreement any understanding reached therein concerning the terms and conditions of employment for our employees in the following appropriate bargaining unit:

> All production and maintenance employees employed at the Employer's Leland, North Carolina facility; excluding office clerical employees, technical employees, professional employees, guards and supervisors within the meaning of the Act.

WE WILL offer to hire as our employees Charles Brown, Oliver Munn, George Jenkins, Warren Bryant, Freddie Brown, John Ganey, and Greg Burton, and **WE WILL** make them whole for any loss of earnings or benefits they have sustained with interest and with no loss of seniority or other rights to which they would have been entitled absent our unlawful refusal to hire them, and notify them in writing thereof.

WE WILL remove from our records any reference to the unlawful warnings issued to employees George Jenkins, Warren Bryant, Warren Jacobs, and Greg Burton and to the suspension issued to employee Greg Burton, and **WE WILL** make Greg Burton whole for any loss of earnings or benefits he may have sustained by reason of our unlawful suspension of him and will notify each of the above employees of these actions in writing thereof.

Our employees have the right to join and support International Woodworkers of America, AFL-CIO, or to refrain from doing so.

GENERAL WOOD PRESERVATIVE COMPANY

Dated: _____ By: _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's office, US Courthouse, Federal Building, 251 North Main Street-Room 447, Winston-Salem, NC 27101. Telephone (919)761-3212.

(2)

No. 90-455

In the Supreme Court of the United States

OCTOBER TERM, 1990

GENERAL WOOD PRESERVING COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

JERRY M. HUNTER
General Counsel

D. RANDALL FRYE
Acting Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

ROBERT F. MACE
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that unfair labor practices by petitioner—a successor employer—and its predecessor prevented the holding of a fair election and therefore warranted entry of a *Gissel* bargaining order against petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-455

GENERAL WOOD PRESERVING COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-47a) is reported at 905 F.2d 803. The decision and order of the National Labor Relations Board (Pet. App. 48a-51a), including the findings and recommendations of the administrative law judge (Pet. App. 52a-87a), are reported at 288 N.L.R.B. No. 102.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1990. The petition for a writ of certiorari was filed on September 14, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Until June 1984, Burke-Parsons Bowlby (Bowlby) operated a facility for the chemical treatment of wood in Leland, North Carolina. Pet. App. 56a. On June 29, 1984, Bowlby sold the facility, including its production equipment, vehicles, and inventory, to petitioner. *Id.* at 76a.

a. In early February 1984, several of Bowlby's production and maintenance employees engaged in a job walkout and began discussions with representatives of the International Woodworkers of America, AFL-CIO (the Union). Pet. App. 57a. By late February 1984, at least 42 of the 64 employees in the production and maintenance unit had signed petitions authorizing the Union to be their collective bargaining representative. *Id.* at 74a-75a. The Union filed a petition for a representation election, and the Board scheduled one for April 6, 1984. *Id.* at 69a.

After the Union began its organizing campaign, Bowlby officials took numerous actions that later became the basis for unfair labor practice charges. They interrogated employees about their union sympathies; threatened employees with closing and selling the facility, with subcontracting out their work, with losing their benefits and jobs, and with other unspecified reprisals if they chose union representation; promised employees that Bowlby would solve their problems without the Union; enforced work rules more stringently than before the campaign began; disciplined several employees because of their union activity; and packed the bargaining unit with non-union employees to dissipate the Union's majority. Pet. App. 59a-70a.

Specifically, Bowlby's president, Richard Bowlby, stated in a letter to employees that the Union posed a "high risk," and that the employees should consider what the Union might "cost" them and not "vote [themselves] into a sea of trouble." Pet. App. 63a-64a. Richard Bowlby also

warned several employees that, if they voted to have the Union represent them, he would ship work to another facility. *Id.* at 36a.

Bowlby's plant manager, Carl Williams, advised several employees that, if the employees elected union representation, they "might as well start looking for another job." Pet. App. 59a-60a.

Bowlby's supervisors issued similar threats. Bowlby supervisor Percy Burns told an employee that, if the Union was elected, Bowlby would close the facility. Pet. App. 61a. Bowlby supervisor Jimmie Smith asked two employees whether they supported the Union and told them that the employees should "get ready to plant a garden because [they] were all going to be on the soup line"; Smith also said that Bowlby would close and sell the facility if the employees elected union representation. *Id.* at 60a. Smith warned at least three other employees that the employees were "going to wind up in the soup line" if the Union was elected. *Id.* at 61a.

Bowlby supervisors Smith, Gary Wood, and Bill Caldwell each held conversations with employees to advise them that they would lose benefits if they elected the Union. Pet. App. 59a, 61a.

Bowlby's production manager, Thomas Greene, issued disciplinary warnings to four employees because of their union activity. Pet. App. 64a-69a. Greene also suspended one of these employees, who was among the earliest and most vocal supporters of the Union, because of his union activity. *Id.* at 66a-67a.

A few days before the election was to occur, in an effort to dissipate the Union's majority status, Bowlby's management brought in about 25 employees from out of state and put them on the list of employees eligible to vote in the election. Pet. App. 69a-70a.

In response to Bowlby's actions, the Union filed unfair labor practice charges with the Board, thereby blocking the scheduled election. Pet. App. 58a, 69a.

b. On June 20, 1984, Stanley Winbourne, the president of petitioner and a former official of Bowlby, addressed Bowlby's employees. Pet. App. 70a. He told them that petitioner was purchasing Bowlby. *Ibid.* He said that he did not favor the Union, but that it was their decision to make. *Ibid.* He assured them that petitioner would hire each of them and that each would start with a "clean slate[ ]." *Ibid.*

On June 28, 1984, the Union sent a telegram to Winbourne, advising him that it continued to represent a majority of Bowlby's production and maintenance employees and informing him of the unfair labor practices committed by Bowlby. Pet. App. 70a-71a. The Union also demanded that petitioner recognize the Union as the production and maintenance employees' collective bargaining representative. *Ibid.*; see also *id.* at 23a.

On June 29, 1984, petitioner purchased Bowlby's assets and hired Bowlby's line supervisors. Pet. App. 76a. Petitioner also retained Greene as production manager, who, as discussed, had disciplined several Bowlby employees for supporting the Union. *Ibid.* In early July, petitioner began hiring production and maintenance employees; Greene was responsible for making hiring recommendations. *Id.* at 73a. Petitioner refused to hire several former Bowlby employees because of their union activity. *Id.* at 70a-74a.

By the end of July 1984, petitioner had hired employees in nearly all of Bowlby's pre-existing production and maintenance classifications. Pet. App. 76a. At that time, a majority of petitioner's 44 production and maintenance employees were previous Bowlby employees. *Ibid.*

Petitioner began operations on July 9, 1984. Pet. App. 76a. It operated out of Bowlby's former facility, serviced

Bowlby's former customers, and made the same products that Bowlby had made. *Ibid.*

2. The Board adopted the findings and conclusions of the administrative law judge that, through the actions described above, petitioner and Bowlby had violated Section 8(a)(1) and (3) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(1) and (3). Pet. App. 48a-49a, 59a-74a. The Board also affirmed the ALJ's finding that petitioner was a successor employer because it had continued Bowlby's business essentially unchanged, had hired a production and maintenance work force the majority of which was previously employed by Bowlby, and had purchased Bowlby with notice of its unfair labor practices. *Id.* at 48a-49a, 59a-70a, 76a-80a (citing *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168 (1973)). The Board ordered petitioner and Bowlby to recognize and bargain with the Union as the representative of the production and maintenance employees. Pet. App. 80a-83a.[1]

The Board agreed with the ALJ that the unfair labor practices of petitioner and Bowlby combined to make a fair election unlikely. Pet. App. 49a-50a, 76a-77a. The Board found that petitioner "commenced its takeover of predecessor Bowlby by discriminatorily refusing to hire known union activists and by committing that violation through Production Manager Thomas Greene, who had

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[1] The Board entered an order on May 12, 1988, that was directed only at petitioner. Pet. App. 51a, 80-83a. On September 30, 1988, the Board entered another order that was directed at both petitioner and Bowlby but was otherwise in relevant part identical to its previous order. See *id.* at 2a n.3. In addition to directing petitioner and Bowlby to bargain with the Union, the Board's order directed them to cease and desist from engaging in unfair labor practices, to expunge the files of the unlawfully disciplined employees and make them whole, and further ordered petitioner to offer to hire the seven individuals whom petitioner had unlawfully refused to hire. *Id.* at 80a-83a.

held the same position with the predecessor." *Id.* at 50a. The Board concluded:

> [W]hatever might be the case had [petitioner] wiped the slate clean and hired an entirely new managerial and supervisory complement, the employees here had received the plain message that supporting the Union was a dangerous proposition regardless of who the employer was.

Ibid.

3. The court of appeals upheld the Board's decision and enforced its order. Pet. App. 1a-47a.

The court affirmed the Board's determination that a *Gissel* order[2] was warranted in light of the unfair labor practices of Bowlby and petitioner. The court, like the Board, reasoned that Bowlby's "numerous unfair labor practices," standing alone, made a fair election unlikely. Pet. App. 43a-44a. The court also agreed that, by refusing to hire several former Bowlby employees because of their union activity, petitioner had "added its own conduct that tended to have a lasting inhibitive effect on the employees' formulation and expression of free choice regarding unionization." *Id.* at 44a; see also *id.* at 33a-35a. The court recognized that "an election, and not a bargaining order, is the traditional and preferred method for determining the bargaining agent for employees." *Id.* at 46a. But the court concluded that, notwithstanding the absence of an election, the Board acted within its discretion in entering a bargaining order, because

> [W]here, as here, "the possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present is slight and . . . employee sentiment once expressed

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[2] *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969).

> through cards would, on balance, be better protected by a bargaining order, then such order should issue."

Id. at 46a-47a (quoting *Gissel Packing Co.*, 395 U.S. at 614-615).

The court also upheld the Board's determination that the order should extend to petitioner as the successor to Bowlby. Pet. App. 33a-44a. The court held that substantial evidence supported the Board's finding that petitioner carried on Bowlby's business essentially unchanged (*id.* 35a), had actual notice of Bowlby's unfair labor practices (*id.* at 20a-27a), and hired a majority of Bowlby's former production and maintenance employees (*id.* at 35a-40a). The court further held, contrary to petitioner's contention, that in entering the order against petitioner the Board was "not required specifically" to identify "the precise percentage of union support that existed in [petitioner's] newly constituted unit." *Id.* at 36a.[3]

ARGUMENT

Despite petitioner's broadside attack on the court of appeals' decision, the only issue actually presented in this case is narrow and fact-specific: whether the court below properly enforced a *Gissel* bargaining order entered by the Board against petitioner, a successor employer, based on the Board's conclusion that unfair labor practices by peti-

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[3] The court also found applicable the principle that an employer "may not defeat a finding of successorship through its own discrimination." Pet. App. 38a n.32 (quoting *American Press, Inc.* v. *NLRB*, 833 F.2d 621, 625 (6th Cir. 1987)). The court observed that here it could "be said with far greater likelihood than not that a majority of the employees in [petitioner's] unit would have been found to have signed the petitions opting for union representation but for [petitioner's] discriminatorily having refused to hire the seven [former Bowlby employees] who had signed the petitions." Pet. App. 39a.

tioner and its predecessor precluded the holding of a fair election. In enforcing the Board's order, the court correctly applied established legal principles to findings of the Board that were supported by substantial evidence. Petitioner's fact-bound challenge thus does not warrant this Court's review.

1. In *Gissel Packing Co.*, 395 U.S. at 613-614, the Court held that in two situations the Board has discretion to order an employer to bargain with a union that has not been selected as the employees' bargaining representative through an election: in "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices; and "in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." In the latter situation, there must be a showing, whether through authorization cards or otherwise, "that at one point the Union had a majority." *Id.* at 614. The Board must also determine "that the possibility of erasing the effects of past practices and of ensuring a fair election . . . is slight and that employee sentiment once expressed through [authorization] cards would, on balance, be better protected by a bargaining order." *Id.* at 614-615. This determination, the Court emphasized,was primarily one for the Board, not reviewing courts, to make. *Id.* at 612 n.32.

The Board in this case made the findings necessary to support a *Gissel* order, and these findings were properly upheld by the court of appeals. The Board found that the Union obtained authorization cards from a majority of Bowlby's employees (Pet. App. 74a-75a), and that Bowlby's employees made up the majority of petitioner's work force (*Id.* at 76a). The Board also found that, in response to the Union's organizing campaign, Bowlby committed numerous unfair labor practices, including unit

packing and threats of plant closure, job loss, and subcontracting. *Id.* at 57a-70a, 75a-76a. These practices, the Board determined, made the holding of a fair election unlikely. *Id.* at 75a-76a.[4] And when petitioner succeeded Bowlby, the Board further found, petitioner too engaged in conduct "clearly calculated to subvert the election process" by "unlawfully refusing to hire known union adherents." *Id.* at 77a.[5] These findings were amply supported by record evidence and were therefore properly sustained by the court of appeals.[6]

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[4] Petitioner disputes (Pet. 10-11) the Board's assessment that these practices precluded the holding of a fair election. As the court below recognized (Pet. App. 39a-44a), that assessment was well within the Board's discretion to make. *Gissel*, 395 U.S. at 612 n.32. The unfair labor practices committed by Bowlby were comparable to those found to justify issuance of *Gissel* orders in other cases. See, e.g., *NLRB* v. *Air Products & Chemicals Inc.*, 717 F.2d 141, 144-147 (4th Cir. 1983); *Piggly Wiggly, Tuscaloosa Div.* v. *NLRB*, 705 F.2d 1537, 1540-1543 (11th Cir. 1983); *Chromalloy Mining & Minerals* v. *NLRB*, 620 F.2d 1120, 1130 (5th Cir. 1980).

[5] Contrary to petitioner's assertion (Pet. 10), the Board did not enter the bargaining order against it based solely on the unfair labor practices committed by Bowlby; the Board also took into account petitioner's unlawful refusal to hire seven former Bowlby employees who supported the Union. Pet. App. 77a. The Board likewise considered this unfair labor practice by petitioner in determining that the chance of a fair election was slight. *Ibid.* Petitioner is therefore incorrect when it asserts (Pet. 10) that this determination was based solely on the fact of petitioner's purchase of Bowlby's business.

[6] Consistent with the Board's reasoning, the court below considered both Bowlby's and petitioner's unfair labor practices in enforcing the Board's order against petitioner. Pet. App. 39a-44a. The court's enforcement of the order therefore was not, as petitioner asserts (Pet. 11), based on a "novel and entirely independent rationale."

The Board properly entered the *Gissel* order against both Bowlby and petitioner upon determining that petitioner was Bowlby's successor (Pet. App. 76a-77a) and that petitioner had notice of Bowlby's unfair labor practices (*id.* at 77a). In this Court, petitioner challenges only the latter determination. See Pet. 20-24.[7] This fact-bound challenge does not warrant this Court's review. In any event, the Board's finding of notice was amply supported by evidence, *inter alia,* that petitioner was (1) aware of the Union's organizing campaign and of Bowlby's response to the campaign, (2) knew that at least one unfair labor practice charge had been filed against Bowlby, and (3) received a telegram informing it of Bowlby's unfair labor practices before it purchased Bowlby. Pet. App. 20a-24a.

2. Petitioner's contention (Pet. 12-15) that the Board erroneously failed to consider events occurring after the commission of the unfair labor practices is without merit. The Board found (Pet. App. 76a) that petitioner had commenced its takeover of Bowlby without making significant changes in Bowlby's managerial and supervisory force—which had committed numerous unfair labor practices—and then, acting through one of the

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[7] Rather than disputing that it is a "successor" under the doctrine of successorship articulated by this Court, petitioner urges (Pet. 22-24) this Court to address "the farthest extent" of that doctrine. This case does not present an occasion for doing so, because the Board's extension of a *Gissel* bargaining order to petitioner was fully consistent with precedent. See *Carlton's Market*, 243 N.L.R.B. 837, 845 (1979), enforced, 642 F.2d 350 (9th Cir. 1981). Compare *NLRB* v. *Cott Corp.*, 578 F.2d 892, 893-896 (1st Cir. 1978), denying enforcement to 232 N.L.R.B. 312 (1977) (finding extension of *Gissel* bargaining order to successor inappropriate where successor hired all the predecessor's employees, remedied all of the predecessor's Section 8(a)(1) and (3) violations, 29 U.S.C. 158(a)(1) and (3), and committed no violations of its own).

predecessor's supervisors, had unlawfully refused to hire seven former Bowlby employees. Thus, "whatever might be the case had [petitioner] wiped the slate clean and hired an entirely new managerial and supervisory complement, the employees here had received the plain message that supporting the Union was a dangerous proposition regardless of who the employer was" (*id.* at 49a-50a). Accordingly, it was reasonable for the Board to conclude that, regardless of events occurring after the unfair labor practices, a fair election was not possible and a bargaining order should issue. *NLRB* v. *Keystone Pretzel Bakery, Inc.*, 696 F.2d 257, 265 (3d Cir. 1982); *Bandag, Inc.* v. *NLRB*, 583 F.2d 765, 772 (5th Cir. 1978); *NLRB* v. *Ace Comb Co.*, 342 F.2d 841, 844 (8th Cir. 1965); *Granite City Journal*, 262 N.L.R.B. 1153, 1158 (1982).[8]

3. Likewise without merit is petitioner's contention (Pet. 16-18) that the Board could not enter a bargaining order against petitioner without finding that the Union was supported by the majority of petitioner's employees. The Board found that the Union enjoyed majority support among Bowlby's employees and that petitioner hired a work force the majority of which had previously worked for Bowlby. Pet. App. 49a-51a, 76a. As the court below recognized (*id.* at 36a), the Board was not required to identify "the precise percentage of union support that existed in [petitioner's] newly constituted unit." A successor

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[8] Petitioner refers to only two "significant" events that it claims the ALJ did not consider: that petitioner did not hire "the two Bowlby officials who were most outspoken in espousing anti-union sentiment"; and that, although petitioner hired seven supervisors who had committed unfair labor practices while employed by Bowlby, several of these supervisors later left petitioner's employ. Pet. 15. There is no basis for petitioner's assertion (*ibid.*) that the ALJ "apparently disregard[ed]" these facts. These facts, in any event, could reasonably have been accorded little significance.

employer's bargaining obligation depends on its hire of a majority of the predecessor's employees, not on its hire of a majority of union adherents. *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 41, 52 (1987).[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JERRY M. HUNTER
General Counsel

D. RANDALL FRYE
Acting Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

ROBERT F. MACE
Attorney
National Labor Relations Board

NOVEMBER 1990

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[9] The court below went on to conclude that it was likely that a majority of petitioner's employees would have signed the union petitions but for petitioner's discriminatory hiring. Pet. App. 36a-39a. This conclusion was merely dictum in light of the court's holding that the Board was not required to determine the percentage of union adherents in petitioner's work force. Petitioner is therefore incorrect in asserting (Pet. 18-22) that in reaching this conclusion the court violated the principle of *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943).

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GENERAL WOOD PRESERVING COMPANY, INC.,
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v.

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Respondent.

PETITIONER'S REPLY BRIEF

CHARLES A. EDWARDS
GRAHAM & JAMES
P.O. Box 1951
Raleigh, North Carolina 27602
(919) 821-8000

Attorney for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

PETITIONER'S REPLY BRIEF

No argument advanced in Respondent's Brief In Opposition counsels against this Court's granting the Petition For Writ Of Certiorari. Despite Board Counsel's attempt to relegate the issues presented in this case to the realm of the "narrow", "fact-specific" and "fact-bound", Brief In Opposition at 7-8, this case in fact presents issues which have been the subject of persistent and divisive debate in the Courts of Appeals. It also represents the first instance in which card-based bargaining order liability imposed upon a successor employer has been presented to this Court.[1]

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[1] Carlton's Market, 243 NLRB 837 (1979), *enf'd sub nom.*

Finally, Board Counsel urges this Court to endorse a method of administrative review which so overstates the breadth of the Board's remedial discretion as to render its administrative adjudication altogether unreviewable.

1. By characterizing as an "assessment" the Board's legal conclusion that the possibility of conducting a fair election was slight, Board Counsel seeks to place this conclusion well within the Board's remedial discretion and therefore beyond the authority of a reviewing court to disturb. Brief In Opposition at 9 n. 4. However, this determination cannot withstand appellate scrutiny as it is unaccompanied by the required factual foundation. The Board conducted *no* appraisal of the effects of the unfair labor practices upon the workforce and made *no* estimate respecting the futility of traditional remedies as required by *Gissel*. 395 U.S. at 614; *see* Pet. App. 75a-76a.

While Petitioner agrees that the choice of remedy is committed to the Board's expertise, that expertise must be exercised against a factual backdrop which is sufficiently clear to enable a reviewing court intelligently and independently to ascertain whether the agency is in compliance with the directives of this Court. As stated in *Gissel*:

NLRB v. Davis, 642 F.2d 350 (9th Cir. 1981), concerned a representation petition filed simultaneously with the successor's assumption of control of the grocery, and the predecessor was not found to have committed any unfair labor practices. In NLRB v. Cott Corp., 578 F.2d 892 (1st Cir. 1978), a bargaining order had issued against the predecessor long before the successor took control of the company. *See* Ponn Distributing, Inc., 203 NLRB 482 (1973). Even in this circumstance, the court of appeals refused to impose the bargaining order upon the successor. NLRB v. Cott Corp., 578 F.2d at 896.

> It is for the Board and not the courts, however, to make that determination, *based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity.*

Gissel, 395 U.S. at 612 n. 32 (emphasis supplied).

The failure of the Board to offer any factual basis for its "assessment" of the likelihood of a fair election constitutes a gross and patent analytical omission. The Fourth Circuit clearly erred in allowing this deficiency to go uncorrected.

The Board's conclusion that General Wood had notice of the commission of serious unfair labor practices is similarly flawed. As the Fourth Circuit's discussion of this issue amply illustrates, the General Counsel presented so very few facts relating to this portion of the Board's case that reliance upon speculation and conjecture is necessary to resolve this pivotal issue. Pet. App. 20a-27a. Indeed, most of the "evidence" to which Board Counsel refers is no more than the unsupported hypotheses found in the opinion of the Fourth Circuit. Brief In Opposition at 10.

In sum, Board Counsel's analysis reflects a view of the administrative process in which there exist (a) unreviewable agency factual findings; (b) "fact-specific" and "fact-driven" "determinations" and "assessments" which are shielded from appellate review, even when they are made without benefit of any articulated evidentiary basis; and (c) remedial alternatives committed to the Board's broad discretion. Such a formalistic and stultified perspective cannot be reconciled with the prior decisions of this Court. *NLRB*

v. Brown, 380 U.S. 278, 292 (1965); *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 316 (1979).

2. Board Counsel challenges Petitioner's argument relating to the Board's failure to prove the union's majority status, Pet. 16-18, with the following *non sequitur*: "A successor employer's bargaining obligation depends on its hire of a majority of the predecessor's employees, not on its hire of a majority of union adherents." Brief In Opposition at 11-12. However accurate this statement might be as a general proposition, it has no relevance to the situation here presented, one in which the predecessor's employees had never chosen the union as their exclusive bargaining representative.

Each of this Court's previous successorship opinions[2] relates to a certified union with a pre-existing collective bargaining relationship with the predecessor employer. Indeed, one of the central issues in *Fall River* was whether the certification had to be "recent" in order to carry forward the presumption of majority status, inasmuch as the *Burns* successorship test contained language relative to "recent certification." *Fall River*, 482 U.S. at 36-37. As this Court explained, certification carries with it a presumption of majority status, and "where . . . the union has a rebuttable presumption of majority status, this status

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[2] John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964); NLRB v. Burns International Security Services, Inc., 406 U.S. 272 (1972); Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973); Howard Johnson Co. v. Detroit Local Joint Executive Board, 417 U.S. 249 (1974); Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27 (1987).

continues despite the change in employers." 482 U.S. at 41.[3]

Because Bowlby had never been subject to a bargaining obligation and therefore the union enjoyed no presumption of majority status, the Fourth Circuit's strained arithmetic exercise aimed at establishing majority union support in the proposed unit is not *dictum*, as Board Counsel claims. Brief In Opposition at 12 n. 9. Rather, it is clear that the Circuit Court, implicitly conceding that the Board's analysis in this regard was flawed, advanced two distinct theories which would have the effect of salvaging the agency's imposition of a bargaining order against General Wood. Under the court's first proposal, the manipulation of the composition of the proposed bargaining unit, including the constructive hiring and dismissal of employees, produced a bare majority of employees who at one time had signed a petition seeking the opportunity to vote in a representation election. Pet. App. 36a-39a.

The second thesis is even more extraordinary: The court concludes that General Wood's failure to hire seven signatories to the petitions constituted "hallmark violations", warranting a bargaining order even in the absence of proof of majority status. Pet. App.

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[3] If, as this Court said in *Fall River*, the Board's analysis in a given case must "keep[]in mind the question 'whether those employees who have been retained will understandably view their job situations as essentially unaltered,'" Fall River, 482 U.S. at 43, the employees' perspective in this case has been wholly disregarded by the Board and the court below. Bowlby employees were *not* represented by a union; they had never voted on union representation; consequently they had no "legitimate expectations in continued representation by their union." *Id.*

41a-44a. Neither of these alternative justifications can find support in, or be premised upon, the agency decisions under review. Consequently, General Wood's reliance upon *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943), is entirely appropriate, and Board Counsel's attempted dismissal of that argument is without substance.

In conclusion, Board Counsel's attempt to portray the issues presented by this case as disputes of fact, unworthy of review by this Court, is unavailing. The Petition presents this Court with the opportunity to resolve longstanding differences among the circuit courts respecting review of Board action and to clarify the contours of successorship analysis. The petition for writ of certiorari should be granted.

Respectfully submitted,

CHARLES A. EDWARDS
GRAHAM & JAMES
P.O. Box 1951
Raleigh, North Carolina 27602
(919) 821-8000

Attorney for Petitioner